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United States
Court of Appeals
for the Ninth Circuit

CALIFORNIA ASSOCIATION OF EMPLOY-
ERS, a California Corporation doing business
under the firm name and style of RENO EM-
PLOYERS COUNCIL,

Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF RENO, NEVADA AND VICIN-
ITY, et al., and NATIONAL LABOR RELA-
TIONS BOARD,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILED

MAR 4 - 1949

PAUL P. O'BRIEN,
CLERK

United States
Court of Appeals
for the Ninth Circuit

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Bond on	273
Certificate of Clerk to Transcript of Record on	277
Designation of Record on (USCA).....	280
Motion to Extend Time for Filing Record on.	275
Notice of	272
Orders Extending Time to File Record on...	276
Statement of Points on (USCA).....	279
Bond on Appeal	273
Certificate of Clerk to Transcript of Record...	277
Complaint	2
Exhibit A—Supplement dated Dec. 8, 1947, and Master Agreement dated May 21, 1947, by and between Reno Employers Council and Building and Construction Trades Council	17
Exhibit B—Letter dated March 17, 1948, R. Gaussi, Secretary-Treasurer to Employer's Council	35

Complaint—(Continued)

Exhibit C—Letter dated May 18, 1948, Reno Building Trades Council to Reno Employer's Council	36
Exhibit D—Letter dated March 26, 1948, Reno Employer's Council to Robert N. Denham, General Counsel, NLRB	39
Exhibit E—Letter dated April 8, 1948, Robert N. Denham, General Counsel, NLRB, to Reno Employer's Council	42
Exhibit F—Letter, Reno Employer's Council to D. W. Everett	43
Consent to Intervention	153, 154
Decision of Court on Motion of NLRB to Dismiss the Complaint	268
Designation of Record on Appeal (USCA)....	280
Judgment Dismissing Complaint	267
Minute Order:	
Sept. 16, 1948—Granting Motion to Intervene	158
Oct. 26, 1948—Extending Time to File Record on Appeal	276
Dec. 22, 1948—Extending Time to File Record on Appeal	276
Motion for Order Exonerating Cash Bond....	151
Motion of the National Labor Relations Board for Leave to Intervene.....	149

Motion of the National Labor Relations Board to Dismiss the Complaint	158
Motion to Extend Time for Filing Record on Appeal	275
Motion to Dismiss Order to Show Cause and Restraining Order filed by all Defendants ex- cept Union of Operating Engineers No. 3...	47
Motion to Dismiss Complaint:	
Filed by Operating Engineers Local No. 3....	147
Filed by all Defendants except Local Union of Operating Engineers No. 3, filed June 7, 1948	145
Filed by all Defendants except Union of Operating Engineers No. 3, filed Sept. 4, 1948	155
Names and Addresses of Attorneys of Record..	1
Notice of Appeal	272
Opinion (Oral) May 28, 1938, re Preliminary Injunction	50
Order Denying Application for a Preliminary Injunction and Dissolving Temporary Re- straining Order	50
Order Exonerating Cash Bond	152
Order Granting Motion to Intervene.....	158

Order to Show Cause and Temporary Restraining Order	45
Statement of Points on which Appellant Intends to Rely on Appeal (USCA).....	279
Stipulation to Intervention of the National Labor Relations Board	154
Transcript of Proceedings on Hearing on Order to Show Cause, May 28, 1948.....	54
Transcript of Proceedings on Hearing on Motion of National Labor Relations Board for Leave to Intervene and Motion to Dismiss, Sept. 16, 1938	160
Undertaking on Appeal	273

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States of
America in and for the District of Nevada

Civil Action, No. 700

CALIFORNIA ASSOCIATION OF EMPLOYERS, a California Corporation, doing business under the firm name and style of
RENO EMPLOYERS COUNCIL,

Petitioner,

vs.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF RENO, NEVADA AND VICINITY, HOD CARRIERS BUILDING AND COMMON LABORERS LOCAL UNION No. 169, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION No. 1242, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION No. 971, LOCAL UNION OF OPERATING ENGINEERS No. 3, OPERATIVE PLASTERERS AND CEMENT FINISHERS LOCAL UNION No. 241, BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION No. 118 OF SACRAMENTO, CALIFORNIA, ELECTRICAL WORKERS LOCAL UNION No. 401, PAINTERS, DECORATORS AND PAPERHANGERS LOCAL UNION No. 567, BOILER MAKERS, IRON SHIP BUILDERS AND HELPERS LOCAL UNION No. 94, BRICKLAYERS, MASONS AND PLASTERERS LOCAL UNION No. 6, JOURNEYMEN PLUMBERS AND STEAM FITTERS LOCAL UNION No. 350, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS UNION No. 224, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION No. 26, ELEVATOR CONSTRUCTORS LOCAL UNION No. 401, WOOD, WIRE AND METAL LATHERS LOCAL UNION No. 208, BLACKSMITHS, DROP FORGERS AND HELPERS LOCAL UNION No. 158, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 533.

COMPLAINT

Comes now your petitioner and for a cause of action for a declaratory judgment respectfully shows: [2]

I.

That the California Association of Employers, is a corporation, organized under the laws of the State of California; that said corporation is qualified to do business in the State of Nevada, and for a number of years last past and immediately prior to the filing of this petition, said corporation was engaged in business in the State of Nevada and doing business under the fictitious name of Reno Employers Council, having its principal place of business in the City of Reno, State of Nevada. That the respondent, the Building and Construction Trades Council of Reno, Nevada, is an organization with various labor unions as its affiliates, in the Counties of Washoe, Storey, Ormsby, Douglas, Lyon, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka, in the State of Nevada, and these unions have jurisdiction over working conditions in construction work in counties in some of the northeastern part of the State of California. That said Building and Construction Trade Union affiliates being the other respondents herein named are affiliated with the American Federation of Labor. That the respondent Union, Ornamental Iron Workers Union No. 118 is a California Union carrying on negotiations in respect to collective bargaining with employers in Building and Construction industry in northeastern California and in western Nevada by and through respondent Building and Construction Trades Council of Reno, Nevada.

II.

That on the 24th day of May, 1947, the petitioner and the Building and Construction Trade Council of Reno, Nevada, [3] entered into a master industry collective bargaining contract wherein petitioner was party of the first part and the Building and Construction Trades Council of Reno, Nevada, and vicinity, by and in behalf of its affiliates and other respondents herein, were parties of the second part, wherein the respective parties did agree for a period from the 24th day of May, 1947, to and including the 21st day of May, 1948, to operate their employee-employer relationship in respect to the matter of union security and other working conditions, which said master contract is appended to this petition as Exhibit "A," and expressly made a part hereof.

That thereafter and after the execution of the master agreement aforesaid the following respondent union, to-wit: United Slate, Tile and Composition Roofers, Damp and Waterproof Association, Local No. 224, Plumbers and Steam Fitters Union, Local 350, Hod Carriers, Building and Common Laborers Local Union No. 169, United Brotherhood of Carpenters and Joiners of America Local Union 971, Painters, Decorators and Paperhangers Local Union Number 567, United Brotherhood of Carpenters and Joiners of America Local Union No. 2142, Sheet Metal Workers' International Association, Local Union No. 26, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 533, did each append thereto as a part of Exhibit "A" a stipula-

tion wherein each of said respondent unions adopted the conditions of the said master agreement.

III.

That this action arises under the Constitution of the United States, Article 1, Section 8, Clause 3; the Act of Congress 49 Stat. 449, USC., Title 29 Secs. 151-166, popularly [4] known as "The National Labor Relations Act," as amended by the Act of Congress 61 Stat. 1 36, USC., Title 29 Secs. 151-197 popularly known as the "Labor Management Relations Act of 1947, as hereinafter more fully appears. The matter in controversy exceeds exclusive of interest, the sum of three thousand dollars.

IV.

That prior to entering into the master agreement under date of May 24, 1947, appended hereto as Exhibit "A," the said Reno Employers Council did act for and on behalf of the following members: Ready-Mix Concrete Co., A. P. Eveleth Lumber Co., Flanigan Whse. Co., Reno Mercantile Co., ber and Coal Co., Consolidated Warehouse Co., Commercial Hardware Company, Crane Company of Nevada, Home Lumber Company of Nevada, Peterson-McCaslin Lumber Co., Paul Bunyan Lumber Co., Flanigan Whse. Co., Reno Marcantile Co., J. R. Bradley & Co., Morrison-Merril & Co., all of whom are Building Material Dealers, E. Billi, C. N. Blabon, Walker-Boudwin Construction Co., Mervin Gardner Co., Hancock and Hancock, Frank Hensley, Ed Lee, Linville Construction Co., Fred C. Mathews, O. & O. Novelty Co., G. Panicari, J. Wat-

kings, Weill Construction Co., Weichman and Probaseo, Paul C. Williams all of whom are Contractors, George Warren Co., and Yancey Company each of whom are Roofers, Molten & Fitch, Anderson & Landucci, Lyle Smith, Ben Bowles Co., Herbert V. Smith Electrical Co., Linnecke Electric Co., Sparks Electric Co., Enterprise Electric Co., Hankin Bros., All Electric Co. of Sparks, Electric Service Co., George Day Electric Co. of Sparks, Tom Wright Electric Co., Harold Deck, Leo Likes, all of whom are Electrical Contractors, Harold Tamka, Mervin Gardner, Camil Solari & Sons, Leo Anima, [5] Lyle Ball, Bill Avery, Elmer Rowe, J. A. Heywood, Tom Johnson, Julius Caselli, Paul Barnes, Jes B. Beskwys, C. H. Balz, Truman A. Jones, Tom Cox, Ed Stauts, Tom Stauts, R. C. Graham, C. E. Springer, J. W. Byassee, Andrew Solari, George Len all of whom are Painting Contractors, National Coal Company, Union Ice Company of Nevada, Reno Press Brick Co., Reno Fuel Co., Heating Air Conditioning Supply Co., Saviens Electrical Products Co., Stevens Heating & Supply Co., all of whom are Oil-Burner Refrigeration Contractors and Sheet Metal Workers, Builders Mill Inc., A. T. Eveleth Co., Paul Bunyan Lumber Co., Home Lumber Co. of Nevada, Jess Watkins Lumber Co., all of whom are Milling Industry Members, Savage & Son, Inc., J. C. Creveling Plumbing & Heating Co., Clark Plumbing & Heating, Louis Dickens, Liberty Plumbing Co., Heating and Air Conditioning Supply Co., Tom Ivers, Nevada Plumbing & Heating Co., Vernon Segale, Saviers & Sons, Inc., Albany Plumbing Company, United

Refrigeration Co., Sierra Appliance Co., all Plumber Industry Members. That each of said members did then and there, and prior to the execution of said contract, authorize the Reno Employers Council as its bargaining agent to enter into said contract for and on behalf of the members thereof. That each of said members is in turn engaged in interstate commerce. That the industry represented by petitioners' members does buy, sell, process and construct structures commonly known to the construction industry in the States of California and Nevada; that a majority of said members of petitioner are licensed to do business and are doing business in California and Nevada, and do transact such business under said licenses in said states. That the major portion of the products bought and sold by the material dealers, members of petitioner, [6] originate from without the States of California and Nevada. That many of said petitioner's members employ and transport their employees among both states aforesaid in perusal of their business. That the members of the Reno Employers Council represent the vast majority of firms supplying materials and doing construction work in the northwestern part of the State of Nevada and in the northeastern part of the State of California, and in the State of Nevada, and elsewhere. That the business of the members aforesaid, and the materials used therein depends upon the uninterrupted free flow of interstate commerce.

V.

That pursuant to the master contract aforesaid respondents did notify applicant on the 15th day of

March, 1948, that they desired to negotiate terms and conditions in regard to the changes or modifications mentioned in said written notice, which said notice is hereto annexed, marked Exhibit "B" and expressly made a part hereof. That immediately thereafter and in good faith, negotiations were undertaken. That it was the opinion of the Reno Employers Council after advise given by legal counsel, that the Labor Management Relations Act of 1947 prevented the continuation of the master agreement beyond May 21, 1948, without a revision of the union security provision of said contract as required by said Labor Management Relations Act of 1947, Whereupon petitioner did notify the unions and the Council, respondents herein, that in its opinion the respective unions should immediately take steps to comply with the Labor Management Relations Act of 1947 by filing the necessary petitions so that proper elections should be held prior to May 21, 1948, for the purpose of securing proper authority to request union security provision in their working agreement. [7] That thereafter and during said negotiations your petitioner took the position in such negotiations that the master agreement could not be continued after the date, May 21, 1948, without compliance with Section 8 A I of the Labor Management Relations Act of 1947, the same being Chapter 120, Public Law 101, which requires an election and affirmative vote of the employees on the question whether union membership be made a condition of employment. That your petitioner is informed and believes and therefore alleges the fact to be that a collective bargaining

agreement entered into between your petitioner and respondents without compliance with said Labor Management Relations Act of 1947 by respondents first accomplished would amount to a conspiracy to defeat the purpose of the act aforesaid and would therefore subject petitioner and respondents to civil and criminal liability. That being fully advised of the position of petitioner, the respondents did affirmatively during negotiation and in particular on the 18th day of May, 1948, address a communication in writing to the Reno Employers Council, hereto annexed marked Exhibit "C" wherein they advised that they recognized the Labor Management of Relations Act of 1947, as "The law of the land," but that it was their belief that the Reno Building Trades Council and the construction industry in the area of California and Nevada aforesaid was not covered by the provisions of said Act and advised petitioners that until feasible procedures for elections were established by the National Labor Relations Board and a Court of competent jurisdiction had ruled the industry to be covered that the only basis of any further negotiations would only be upon the condition of the maintenance of the so-called union security clause or closed-shop provision which presently contained in the Master agreement, Exhibit "A" and as provided for in other separate agreements between petitioners and [8] respondents. Whereupon your petitioner did address a communication in writing to respondent, Reno Building Trades Council a copy of which said communication is hereto annexed and marked Exhibit "D." That thereupon

all negotiations between applicant and respondents did terminate.

That during the negotiations aforesaid and in an endeavor in good faith to ascertain the answer to the foregoing justicable question and controversy, your petition did communicate with Robert N. Denham, General Council for the National Labor Relations Board in Washington, D. C., on the 26th day of March, 1948, requesting from him a construction of whether or not the provisions and circumstances of and surrounding the master agreement were such as to bring the building and construction industry in the area within which members of your petitioner do business under the terms of the Labor Management Relations Act of 1947, a copy of which letter is hereto annexed and marked Exhibit "E." That in reply the said Honorable Robert N. Denham did advise your petitioner that the problem enclosed in the inquiry of your petitioner was a controversial one which doubtless will be sometime subject to a board or court decision and one in which he felt he was not authorized to give an opinion. A copy of said reply is hereto annexed marked Exhibit "F."

VI.

That in the past all collective bargaining agreements in the Building and Construction industry, and in particular those between petitioner and respondents have always contained a closed shop provision, or as sometimes denominated "union referral slip method" under which your petitioner is informed and believes and therefore alleges the fact to be, no individual or employee is permitted

to be hired under Exhibit "A" or any [9] of the separate agreements aforesaid unless said employee did possess and exhibit to the employer a slip, certifying in effect that said employee was a member of the proper affiliated union and/or recommended by said union to the employer. That the continuation of said condition aforesaid referred to as the "union security clause" or "closed shop" provision of the master contract would be in direct violation of Section 7 of the Labor Management Relations Act of 1947, the same being a Federal Statute.

VII.

That your petitioner is informed and believes and therefore alleges the fact to be that respondents will not negotiate or bargain upon any other assumption than that they are not covered by the provisions of the Labor Management Relations Act of 1947 and that they have determined that they will not comply with the provisions of Section 8 A 3 of said Act; that your petitioner is informed and believes and therefore alleges the fact to be that the position of respondents whereby they have contended throughout their negotiations that they are not covered by said Labor Management Relations Act of 1947 is not in good faith, but is a subterfuge for the purpose of coercing the petitioner into complying with the original demands for an amendment to said agreement under the master agreement, particularly in regard to wages for the reason that throughout the entire negotiations aforesaid respondents have made the same wage demands, and it is therefore the belief of your

petitioner that said collective bargaining has not been in good faith on the part of respondents, and is merely a subterfuge to compel the petitioner and its members to meet such increased wage demands or to be subjected to economic coercion by reason of [10] strikes, slow downs and other tactics normally employed by such unions under such circumstances.

VIII.

That the respondents, United Brotherhood of Carpenters and Joiners of America, Local Union Number 1242, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Number 533 agree with petitioners and have moved to comply with the Labor Management Relations Act of 1947 to accomplish a proper election upon the question of the union security provisions aforesaid, and are made party respondents herein for the sole purpose of obtaining an adjudication of all of the rights of the respective parties to the master contract aforesaid.

IX.

That before further negotiations or any collective bargaining in good faith, or otherwise, between the parties hereto can be accomplished, the question, whether or not the Federal Labor Management Relations Act of 1947 covers and governs in the premises must be determined prior to the termination of the master agreement aforesaid; that said master agreement will terminate at midnight May 21st, 1948; that at the time of the filing of this complaint a declaratory judgment could be secured which

would terminate the controversy and permit orderly negotiations of the controversies involved; that there is insufficient time available within which the Court can fix a time for the determination of the justicable controversy alleged before such termination and that therefore unless a temporary restraining order is issued upon the allegations and prayer of this verified petition, said master contract and other contracts alleged herein will so expire; that unless such temporary [11] restraining order is issued the said master agreement will expire, renewal thereof or substitution therefore will be precluded and the entire industry over the area stated in California and Nevada will be thrown into a management-employee relation condition amounting to chaos until the entry of the declaratory judgment herein prayed for. That any interruption of the status quo of the parties hereto will interfere with the free flow of interstate commerce by reason of the interruption of the buying, selling, transportation of lumber, paints and other materials, and labor between the States of California, Nevada and others by reason of slow-downs, strikes and other forms of coercion which your petitioners are informed and believe and therefore avers to be the fact that said respondents will employ immediately upon the termination of the master agreement and other contracts in the event that petitioners do not meet the demands of respondents contained in their letter of May 18th, 1948; That your petitioner is informed and believes and therefore alleges the fact to be that this is a case of first impression in the District Court of the United

States of America and that unless the temporary restraining order herein prayed for is granted by this Court, the issue will become moot and the contractual relationship between petitioners and respondents cease before this Court has had time to consider and determine the jurisdiction of this Court to entertain this cause between these parties. That for the foregoing reasons the damages resulting to the petitioner and the public will be irreparable and there is no adequate remedy at law or otherwise for the maintenance of the status quo, other than by the issuance of a temporary restraining order to prevent any such coercive action on the part of respondents until such time as this Court renders its declaratory judgment [12] affirming or denying the coverage afforded by the Labor Management Relations Act of 1947 to the areas, persons and industries covered by the master agreement aforesaid and other agreements aforesaid.

X.

That your petitioner does not contest or object to the fact that respondents are the proper, recognized bargaining agents for the employees in the aforesaid industry for the purpose of negotiating and bargaining for hours, wages and working conditions, but that said petitioner does contend that respondents have not complied with the Labor Management Relations Act of 1947 in respect to having had the proper elections authorizing said bargaining agents of respondents herein to negotiate and contract for a union security clause in any collective bargaining contract arrived at after ne-

gotiation with petitioner; that in the event this Court finds the aforesaid construction industry to be governed by the Labor Management Relations Act of 1947 then and in that event the petitioners allege that at the date of this petition, said respondents are qualified under said act to collectively bargain respecting wages and hours, but are not qualified to bargain in respect to any such collective bargaining agreement containing a union security provision, but in the event this Court should hold that the Labor Management Relations Act of 1947 does cover the industry represented by petitioners as agents and representative, then and in that event petitioner upon information and belief alleges the fact to be that any further collective bargaining negotiations on the part of respondents will contain an ultimatum to the effect that any wage agreement arrived at in the future irrespective of the action taken by respondents in respect to qualifying or not [13] qualifying or by eliminating from the negotiation the union security provision is to be retroactive in effect from the 21st day of May, 1948, that in such event the negotiations will amount to a failure on the part of respondents to bargain collectively in good faith.

Wherefore, Petitioner prays judgment as follows:

1. That respondents be required to answer and set forth their contentions in regard to the controversies presented in this petition;
2. That this Court by its declaratory judgment declare and decree whether or not the Labor Management Relations Act of 1947 governs and con-

trols any collective bargaining agreement between the parties hereto, particularly under Exhibit "A" hereof.

3. That this Court enter a temporary restraining order against respondents restraining them from using coercion of any kind to prevent the maintenance of the status quo until a declaratory judgment as herein prayed for can be rendered by this Court; and that after due notice to respondents the Court enter its preliminary injunction to the same effect;

4. That in the event this Court finds that the Labor Management Relations Act of 1947 controls and governs the collective bargaining of the parties hereto that this Court order that any agreement arrived at by the parties hereto thereafter in respect to wages shall date from the date such agreement shall be entered into and shall in no event become retroactive from that day to May 21st, 1948.

5. That this cause, when at issue, be set for trial at the earliest possible date, to have preference over all other cases, excepting older matters of the same character and matters to which special precedence may otherwise be given by law.

6. For such other further and general relief as the Court [14] may deem meet and proper in the premises.

7. For their costs of suit therein expended.

/s/ BROWN & WELLS,
Attorneys for Petitioner.

United States of America,
State of Nevada,
County of Washoe—ss.

Winston M. Caldwell, being duly sworn on behalf of the petitioner corporation in the above entitled action says:

That he is the president of said corporation; that he has read the foregoing complaint and petition, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matter that he believes it to be true.

/s/ WINSTON M. CALDWELL.

Subscribed and Sworn to before me this 21st day of May, 1948.

(Seal) /s/ ROBERT W. WELLS,
Notary Public in and for the County of Washoe,
State of Nevada.

My Commission Expires: August 20, 1950. [15]

EXHIBIT "A"

December 8, 1947

Supplement to the Building and Construction
Master Agreement

The following is a supplement to the Building and Construction Master Agreement entered into between the parties this date and said provisions of this supplement to expire May 21, 1948.

Separability Clause:

The provisions of this agreement are deemed to be separable to the extent that if and when a court

of competent jurisdiction adjudges any provision of this agreement in its application between the union and the undersigned employer to be in conflict with any law such decision shall not affect the validity of the remaining provisions of this agreement but such remaining provisions shall continue in full force and effect, provided further, that in the event any provision or provisions are so declared to be in conflict with a law, both parties shall meet immediately or as soon as practicable for the purpose of renegotiating an agreement on provision or provisions so invalidated.

In Witness Whereof, the parties hereto have set their hands and seal this 8th day of December, 1947.

BUILDING TRADES COUNCIL OF RENO,

By /s/ **HARRY A. DEPAOLI.**

RENO EMPLOYERS COUNCIL,

By /s/ **ROY B. FLIPPIN. [16]**

MASTER AGREEMENT

This Agreement made and entered into by and between the Reno Employers Council for and on behalf of the General Contractors, Sub-Contractors, who have signified their approval thereof by the attached authorization attached hereto, and herein-after referred to as the Employer and the Building and Construction Trades Council of Reno, Nevada, and vicinity, and its various affiliates for the counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka Coun-

ties, all affiliated with the American Federation of Labor, who except for themselves, and for their various crafts councils and for their various local Unions, which have jurisdiction over the work in the territory hereinabove described, hereinafter referred to as the Union.

Each local Union authorizing the acceptance of this agreement does so by attaching a stipulation to that effect, signed by its duly elected officers, which will be attached hereto, and becomes a part hereof.

Witnesseth: In consideration of the premises and of the respective promises, agreements, and covenants of the said parties signatory hereto, do hereby mutually agree as follows: [17]

Witnesseth

Definitions:

The Term "Employer" as used herein shall refer to the persons, firms, copartnerships, or corporations or association who are members recognized by the State Contractors Board of Nevada, and who are signatory to this Agreement.

The Term "Union" as used herein shall refer to the labor organizations signatory to this Agreement and to all members of the said labor organizations.

This Agreement shall apply to any employee who performs work falling within the recognized jurisdiction of the Union.

Jurisdiction:

The Building and construction Trades Council of Reno is recognized as the exclusive representative

for collective bargaining of the employer's employees covered by this Agreement.

This Agreement covers all work within the jurisdiction of the Unions signatory hereto as recognized by the Building and Construction Trades Department of the American Federation of Labor and performed in the Counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka, all in the State of Nevada.

This Agreement will in no way conflict with any of the by-laws or their provisions of any local union affiliated with the Reno Building Trades Council, nor will be construed to mean that a subcontractor cannot sign an Agreement with a local union, of whose workers he employes, nor will it supersede any local Agreement now in full force and effect.

Employment Clearance:

The Employer shall call upon the Union and employ in the performance of work within the jurisdiction of the Union only qualified members in good standing and properly cleared by said Union, and that, upon the execution of this Agreement, all of the present employees of the contractor not members of the Union shall become members of the Union; said workmen shall make application for membership in said Union immediately after the execution of this Agreement and all such applications for membership shall be received and accepted by the Union upon terms and qualifications not more burdensome (as to the initiation fees or

dues, or otherwise) than those applicable at such time to other applicants to such Union. They shall, however, upon the execution of this agreement be immediately cleared by the Union to the job classification under which they are employed.

It is further agreed that when craftsmen covered by this agreement are required, the Employer shall call upon the Union to supply such craftsmen, but when a shortage of craftsmen exists, and they cannot be supplied by the Union, the Employer may employ craftsmen who are satisfactory to the Employer; provided that such craftsmen so desired shall be properly cleared through the Union as above indicated.

This agreement shall not apply to Executives, Superintendents, Assistant Superintendents, General Foremen or Civil Engineers and their helpers, Timekeepers, Messenger Boys, Guards, Confidential Employees and Office Help. All foremen and subforemen shall be members of their respective union.

Show Up Time:

Any employee shall be notified at least two hours before being required to report for work. When possible, the Employer shall notify the employee the night prior to the day upon which he is required to work. An employee shall keep the employer advised at all times of his correct address and telephone number. In the event an employee is instructed to report for work and does report for such work, but is not given any work, he shall be paid according to the by-laws of the craft affected.

Union Activity:

No employee shall be discharged or discriminated against for activity in, or representing a Union. No employee shall suffer discharge without just cause, provided, however, the employer shall be the sole judge of the qualifications of his employees and provided further that the Union shall be the sole judge of the qualifications of the employee for membership in the Union. [18]

In the event that the employee is discharged without just cause, he may be reinstated with payment for time lost. In the event of a dispute, the existence or non-existence of "just cause" shall be determined as provided under "Settlement of Disputes" of this Agreement.

Higher Wages:

No employee receiving a higher rate of pay shall suffer a reduction of pay by reason of the execution of this Agreement.

Bonds:

No employee shall be required by Employer to deposit a cash bond with his Employer or any other person. The Employer shall pay the premium upon all required surety bonds.

Settlement of Disputes:

The individual Unions shall appoint a working employee as a steward on each job, whose duty it shall be to receive all grievances or disputes from employees, and adjust them immediately with the Superintendent in charge of the job or other employer's representatives. Stewards shall not be discriminated against in any manner by the employer

or his agents because of, or on account of, his activities in presenting and adjusting grievances of disputes. It is recognized by the Employer that it is desirable that the person appointed steward remain on the job as long as there is work in the particular craft or trade of the steward.

In the event that grievances, disputes or controversies cannot be settled between signatores to this agreement, a Board of Arbitration shall be created for the settlement of such grievances, controversies or disputes. It shall be composed of not more than six (6) representatives selected by the Building and Construction Trades Council, and not more than (6) representatives selected by the Employer, and these (2) groups shall select a disinterested party immediately, who shall have no business or financial connection with either party, the disinterested party shall serve as chairman and shall adopt rules of procedure which shall bind the contracting parties. The decision of said Board shall be rendered by a majority of its members and shall be rendered within forty-eight (48) hours after submission. Said decision shall be final and binding on both parties. Pending such decision, work shall be continued in accordance with the provisions of this contract. The expense of employing said seventh person shall be borne equally by both parties. Any grievance arising under the terms of this agreement must be submitted in writing either by the Union or the Employer to the Board of Arbitration within 30 days of the date upon which the grievance is alleged to have occurred. Complaints

not filed within 30 days shall be invalidated and there shall be no right of appeal by either party involved.

Application to Sub-Contractors:

The terms and conditions of the Agreement insofar as it affects Employer shall apply to any sub-contractor under the control of, or working under contract with Employer upon work covered by this Agreement and said sub-contractor with respect to such work shall be considered as an Employer.

Conflicting Contracts:

Any oral or written agreement between an Employer and an individual employee who is a member of Union, which conflicts or is inconsistent with, this Agreement or any supplemental agreements hereto, which dis-establishes or tends to dis-establish relationship of employer and employee, or establishes a relationship other than that of employer and employee, shall forthwith terminate.

Any oral or written agreement between an Employer and an individual employee who is not a member of Union, which conflicts or is inconsistent with, this Agreement or any supplemental agreement hereto, which dis-establishes or tends to dis-establish relationship of employer and employee, or establishes a relationship other than that of employer and employee, shall terminate upon such employee's admission into membership in Union.

No oral or written agreement which conflicts, or is inconsistent with, this agreement or any supplemental agreements thereto, shall hereafter be en-

tered into by and between Employer and any individual employee performing work within the recognized jurisdiction of Unions.

Elimination of Restrictions of Production:

No rules, customs or practices shall be permitted that limit production, or increase the time required to do any work. There shall be no limitation or restriction [19] of the use of machinery, tools or other labor-saving devices, save and except the use of spray painting equipment in general construction.

Cooperation With Employer's Safety Measures:

The Unions shall cooperate (1) with the Employer and with each other in the carrying out of all Employer's safety measures and practices for accident prevention and (2) employees shall perform their duties in each operation in such a manner as to promote efficient operation of each particular duty of any job as a whole. The contractors signatory to this agreement shall carry Nevada Industrial Insurance.

Jurisdictional Disputes:

There shall be no cessation or interference in any way with any of the work of Employer by reason of jurisdictional disputes between the various A. F. of L. Unions with respect to jurisdiction over any of the work covered by this agreement. Such disputes shall be settled by the Unions themselves in accordance with the laws of the Building and Construction Trades Department of the American Federation of Labor.

Apprentice Training:

That the Contractors and the Unions recognize the need for apprentice training and to this end the apprentices in each of the trades employed shall be in full conformity with the provisions of the Federal Apprentice Training Program governing employment of apprentices upon any and all work coming under the jurisdiction of the Reno Building Trades Council and its affiliated unions.

Continuous Operations:

This Agreement shall not prevent the General Contractors for negotiating or making agreements with Unions signatory to this Agreement with respect to projects which require continuous operations and over which said Unions possess jurisdiction and any existing agreements of such nature shall not be affected hereby.

Holidays:

Holidays are New Year's Day, Memorial Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day and Christmas Day. Holidays falling on Sunday will be observed on the following Monday. All Saturday, Sunday and Holiday work shall be paid for at the overtime rate of the craft involved.

Wage Scales Apply to Classifications:

The Contractor agrees that the wage scales shall be recognized to applying to classifications rather than to employees; that any employee performing work shall be paid at the rate the classification his work calls for. In the event that it becomes necessary for the employee to work at more than one

classification within the craft in any one day, the employee shall receive the rate of pay of the highest paid classification.

Travel Allowances and Subsistence:

When the By-Laws and Working Rules of International, National or Local Unions in effect on the date of the execution or renewal of this Agreement require travel allowances to be paid, allowances will be paid in accordance therewith for the craft affected.

Working Rules: Building Construction:

1. Eight (8) consecutive hours between 8 AM and 5 PM shall constitute a day's work at straight time except in those crafts where a shorter work day prevails and on shift work.

2. The work week shall be Monday, 8 AM through Friday, 5 PM. All overtime worked before or in excess of these hours shall be paid for at the overtime rate of the craft involved.

3. When so elected by the Contractor, men may be worked on a shift basis provided the signatory Unions are notified, when possible, twenty-four (24) hours in advance of the effective date of the starting of such shift. When employees are required to work on a shift basis they shall be paid and shall work as designated by the Unions affected. It is agreed that the straight time shift work may run from 12:01 AM Monday to Midnight Friday. That eight (8) hours of work will constitute the work day of each shift, except that more than one shift may be worked in accordance with the working rules of the crafts involved. [20]

Other Unions:

(a) That services of members of Unions other than those listed in the Agreement, and on whose behalf this Agreement is executed by the signators, shall be performed by the members of the said Unions according to the terms of the Agreement, and according to the wages and working rules that are established at the date of execution of this agreement by said local Unions.

(b) Nothing herein shall prohibit Unions other than those listed in the Agreement from negotiating and executing changes in wage scales or working conditions not in conflict with any of the provisions of this Agreement.

(c) Any changes in such wage scales (attached hereto and made a part hereof) or working rules must be made in the manner provided by the By-laws and Constitutions of the respective Unions and then only upon 30 days' notice to the contractors and with provision for completing, at existing wage scales and working rules all work which is in progress or upon which bids have been submitted or committments made 30 days or more prior to the effective date of this change.

(d) All work involving these other Unions upon which bids have been submitted or committments made shall be registered with the Building and Construction Trades Council, described in the Agreement, within 15 days after notice of change in wage scales and working conditions and work commenced on these registered jobs not later than 30 days after date of registration.

Unions Will File By-Laws, Etc.

The Unions shall immediately after execution of this agreement file with the General Contractors, signatory to this agreement, certified copies of their constitutions, by-laws, wage scales and working rules.

Effective and Termination Date:

This agreement shall remain in effect for a period from May 24, 1947, to and including May 21, 1948, and shall continue to remain in full force and effect thereafter, except as to wages and hours, which may be subject to change or modification by a thirty (30) day notice being served in writing by either party upon the other party for a desired change in this Agreement. Following the giving of such notice, the parties shall proceed to negotiate as to the changes or modifications mentioned in the written notice, the contract remaining in full force and effective at all times until the conclusion of negotiations and an agreement upon any changes or modifications. Following such agreement, a supplement to this Agreement shall be entered into and executed by the parties which supplement shall designate the changes which have been agreed upon, and except as to such changes, this Agreement shall remain in full force and effect unchanged. The above clause (the 30-day clause) to be used only once during the contract year——.

Both parties hereby agree to abide by all sections of the above Agreement.

If any Section or part thereof of this agreement is found to be in violation of any State or Federal law it would not invalidate the balance of the agreement.

In Witness Whereof, the parties hereto have hereunto set their hands and seals by their respective officers thereunto duly authorized.

This 21st day of May, 1947.

ALL LOCAL UNIONS
LISTINGS,

/s/ HARRY A. DEPAOLI,
Pres. Nev. State Fed. of Labor, Representing Reno
Bldg. Trades Council and vicinity;

CONTRACTORS LISTING,

/s/ ROY B. FLIPPIN,
Representing General and/or
Independent Contractors.

STIPULATION

We the duly authorized officers of the Hod Carriers, Building and Common Laborers Local Union Number 169, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Reno Employers Council. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into be-

tween the General Building Contractors of Reno and Local 169.

Wage scale to be \$1.30 per hour, effective May 24, 1947.

HOD CARRIERS, BUILDING AND
COMMON LABORERS LOCAL
UNION NO. 169,

/s/ BERT P. McGUIRE,

/s/ ROBERT GAUSSI. [22]

STIPULATION

We the duly authorized officers of the Painters, Decorators and Paperhangers Local Union Number 567, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Painting Contractors. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the Painting Contractors of Reno and Local 567.

Wage scale to be \$17.00 per day for eight (8) hours. \$2.00 per hour for seven (7) hours, \$3.00 per hour for one (1) hour.

To be effective May 27, 1947, to run to May 21, 1948.

PAINTERS, DECORATORS AND
PAPERHANGERS LOCAL UNION
NUMBER 567,

A. O. McGINTY,

Pres. [23]

STIPULATION

We, the duly authorized officers of the Plumbers & Steam Fitters, Local Union Number 350, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Plumbing and Steam Fitting Contractors. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the Plumbing and Steam Fitting Contractors of Reno and Local No. 350.

The wage scale to be \$2.25 per hour effective May 28, 1947, and to run to May 21, 1948.

PLUMBERS AND STEAM FITTERS
UNION, LOCAL 350,

/s/ SIDNEY DALTON. [24]

STIPULATION

We the duly authorized officers of the Plumbers & Steam Fitters, Local Union Number 350, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Oil Burner & Refrigeration Contractors. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union

and/or the working agreement entered into between the Oil Burner & Refrigeration Contractors of Reno and Local 350.

The Wage Scale to be \$2.25 per hour effective May 28, 1947, and to run to May 21st, 1948.

PLUMBERS AND STEAM FITTERS
UNION, LOCAL NUMBER 350,

/s/ C. C. TARNER,

/s/ SIDNEY DALTON. [25]

STIPULATION

We the duly authorized officers of the United Slate, Tile and Composition Roofers, Damp and Waterproof Association, Local No. 224, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Reno Employers Council. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the Roofing Contractors of Reno and Local 224.

UNITED SLATE, TILE AND COMPOSITION
ROOFERS, DAMP AND
WATERPROOF ASSOCIATION,
LOCAL NO. 224,

/s/ HAROLD VAN GILDER. [26]

STIPULATION

We the duly authorized officers of the United Brotherhood of Carpenters & Joiners of America Local Union No. 971, an Affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the General Contractors. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the General Building Contractors of Reno and Local No. 971.

The wage scale to be \$2.00 per hour.

Effective May 26, 1947. To run to May 21, 1948.

UNITED BROTHERHOOD OF CAR-
PENTERS & JOINERS OF AMER-
ICA LOCAL UNION 971,

/s/ J. N. BYARS,

/s/ ERNIE M. REYNOLDS,

/s/ MARK HESSEE,

/s PAUL CRAFTON,

/s/ LOUIS PALEY;

FOR THE INDEPENDENT AND/OR
GENERAL CONTRACTORS:

/s/ ROY B. FLIPPIN,

/s/ STERLING BUILDERS, INC.,

By C. W. BAKER. [27]

EXHIBIT "B"

March 17, 1948

Employer's Council
Byington Building
Reno, Nevada

Gentlemen:

At the last regular meeting of the Building Trades Council of Reno and Vicinity, held under date of March 5, I was instructed to communicate with your honorable Body and request the following.

It is our desire to open negotiations on the Master Agreement in order to bring about certain changes which will make our Agreement in accordance with the provisions of the Taft-Hartley Act.

It has been brought to our attention that our Agreement is not now in full accordance with the provisions of the above noted Act, which will necessitate the changes which we desire to effect.

We sincerely hope that your Council will be favorable to our request.

Very truly yours,

(Seal) /s/ R. GAUSSI,

Secretary-Treasurer. [28]

EXHIBIT "C"

Building Trades Council of
Reno and Vicinity

440 North Virginia Street, Reno, Nevada

May 18, 1948

Reno Employer's Council
Byington Building
Reno, Nevada

Gentlemen:

This communication will serve to confirm our verbal discussion with your Honorable Body concerning the position of the Reno Building Trades Council with regard to its Master Agreement and the provisions contained therein.

It is a recognized fact that the Taft-Hartley Act is a recognized Law of the land—being duly passed by the Congress of this United States, however, it should be further considered that it be the sense of the Reno Building Trades Council that the construction industry is not covered by the Taft Hartley Act, that there has been no feasible procedure for elections set up by the National Labor Relations Board for on-the-Job construction elections now being held in Pennsylvania near Pittsburgh and in Michigan around Detroit acceptable procedures of elections for on-the-job Construction Industry, and that in any event, the National Labor Relations Board, through General Counsel Denham, has advised that it is unable to hold elections at the present time or give any definite information as to when they will be held in our State, or under what

procedure, and it is our contention that the contractors and unions can not be held in Violation of the Act, even though charged with unfair labor practices until:

- (a) It is determined by the courts that we are covered by the Act, and
- (b) Until feasible procedures for elections are established by the Board, and

That it still further be the sense of the Reno Building Trades Council that a uniform policy of negotiating or renegotiating collective bargaining agreements for the Construction Industry on the job shall be to negotiate agreements which, if they contained a "no-strike" and/or "arbitration" clause, shall also contain our present "union security" clause (not the so-called union security clause in the Taft-Hartley Act), which will permit us to continue the practice of working on a union basis without jeopardizing our rights to strike; Failing to negotiate on the above basis, the alternate procedure shall be to eliminate all three of these clauses and related clauses from the agreements in the future, which leaves only posted wages, hours and working conditions. [29]

It shall be further construed as a Statement of Policy that we shall negotiate wages, classifications and working conditions and continue to negotiate the administrative terms of the agreement until:

- (a) Feasible procedures for elections are established by the National Labor Relations Board acceptable to the unions, and
- (b) Further decisions are rendered on the question of Intra-Interstate Status.

Further proposals submitted by the Reno Building Trades Council are as follows:

That the original proposal on the wages (twenty-five cents per hour increase) and hours as submitted to you shall apply to the following Crafts: Carpenters; Electricians; Painters; Plumbers and Roofers;

The wage scale as previously submitted by the Laborer's Local Union Number 169 shall carry the increase rate of twenty-five cents per hour above the present rate, namely, that of one dollar and thirty cents per hour;

The Reno Building Trades Council agrees not to negotiate the wage scale of the Sheet Metal Workers Local Union Number 26 of Reno, Nevada, however, at the same time, we waive no rights or privileges which might impair the rights of the above noted Local Union to negotiate their own wages, hours and conditions or any other provisions of their present contract.

You may be assured that the Reno Building Trades Council will be more than willing to further negotiate or consider any counter proposals which your organization may wish to offer.

Looking forward to receiving a prompt and favorable reply, we remain,

Respectfully,

RENO BUILDING TRADES
COUNCIL,

By /s/ D. W. EVERETT,
Chairman, Negotiations
Committee.

EXHIBIT "D"

March 26, 1948

Robert N. Denham, General Counsel
National Labor Relations Board
Washington, D. C.

Dear Sir:

We are addressing this memorandum to you for the purpose of securing immediate instructions and advice on what steps are necessary to renew a Master Agreement covering the Building Trades Industry in Reno and surrounding counties.

The Parties to Agreement

The American Federation of Labor Building and Construction Trades Unions of Reno, Nevada, and vicinity and its affiliates for the counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka Counties, has in its membership all Building Trades Unions which have jurisdiction over construction work in the territories hereinabove described, and

The Reno Employers Council is an affiliate of the California Association of Employers and is a non-profit employers association formed for the purpose of representing employers in their labor relations. The Reno Employers Council has as one of its members the Independent Contractors Association of Reno as well as a majority of all other contractors and subcontractors and suppliers of building materials within Washoe County and surrounding areas.

Historical Background

Prior to 1947 the Building Trades and Construction Industry operated with individual working agreements. In May, 1947, a Master Agreement between the Reno Employers Council, for and on behalf of its members, and the Building Trades Council of Reno, for and on behalf of its affiliated Unions, entered into a Master Agreement. A copy of this Agreement (Exhibit 1) is attached hereto, together with the individual stipulations which identify the various Unions and establish the job classifications and wage rates of each individual Union.

The parties to the Master Agreement are desirous of complying with all laws and regulations which might be applicable. With this in mind, informal conferences have been held to explore what revisions will be necessary to meet the requirements of the National Labor Relations Act of 1947. Legal counsel has been retained by both parties and conflicting interpretations have been the result.

We have before us the NLRB Release R-39 (February 11, 1948), as found in CCH P. 8466 as well as NLRB Release R-48 (March 10) CCH P, 8469. Because of the opinions expressed in these two releases and the conflicting legal advice we have received, the parties to the Agreement have agreed to abide by your decision on the procedure to be followed so that we might continue the Master Agreement between us and be in full compliance.

Your attention is called to those Sections of the Agreement dealing with Union security. As you already know, the Building Trades have historically

operated under a closed shop security provision. The question now before us is whether it will be necessary for the parties to the Master Agreement to follow the procedures outlined in your Release No. R-38, i.e. necessity of U. A. election, if reopening notices are filed by the Unions on wages only.

It will be noted that the anniversary date of the Master Agreement is May 21, 1948, and the contract has no specific termination date.

We are desirous of having an opinion from you as to what procedure must be followed. Time is of the essence. The sixty-day reopening notices have been issued but proposals have not been submitted. It is the desire of all parties to maintain the harmonious relationships that have existed between the parties in the past and this can only be done by the continuation of a Master Agreement, which complies with all the requirements of Federal Law.

Respectfully submitted,

RENO EMPLOYERS COUNCIL,
W. M. CALDWELL.

WMC:jld Enclosures. [32]

EXHIBIT "E"

National Labor Relations Board
Washington, D. C.

April 8, 1948

Reno Employers Council
Attention Mr. W. M. Caldwell
P. O. Box 290
Reno, Nevada
Gentlemen:

This will acknowledge your letter of March 26, 1948, in which you make inquiry with respect to the procedures required for the renewal of the agreement between the Reno Employers Council and the Building and Construction Trades Council of Reno.

The problem which you pose is a controversial one which doubtlessly will at some time be the subject of Board and Court decisions, and is one to which I do not feel justified in giving a solution without very thorough and careful study. I regret, therefore, that I find it necessary to decline to advise you on this matter. I am sure that you will understand the reason when you consider how many such requests have been directed to me in these busy times. I sincerely hope that these problems will soon become settled and that your legal advisers can now give you the assistance which you need.

Returned here is the copy of the agreement which you designated as Exhibit 1, in your March 26th letter.

Sincerely yours,

/s/ ROBERT N. DENHAM,
General Counsel.

Attachment. [33]

EXHIBIT "F"

Mr. D. W. Everett
440 North Virginia St.
Reno, Nevada

Dear Mr. Everett:

The negotiating committee, acting on behalf of all firms who have authorized the Reno Employers Council to represent them in their contractual relationships with the Building Trades Council and affiliate Unions, have instructed the writer to transmit the following reply to your communication dated May 18th and received May 18th and received May 19th.

In the negotiation held at the Labor Temple yesterday, May 18th, we informed you and the Building Trades Council's negotiating committee that it was the position of the employers involved in the Master Contract that certain formal N.L.R.B. action was necessary before the contract, in its present form, could be extended. We further advised you that we were already in negotiations with a majority of the individual unions involved, on wages and hours, and that, in our opinion, the only proper subject for negotiation between the Building Trades Council and the Reno Employers Council was regarding the Sections of the Master Agreement which required revision by reason of the L.M.R.A. of 1947.

We clearly stated that neither the employers involved nor we, their representatives, were willing to be parties to any agreement which contained working conditions, contrary to the requirements of Law.

Your communication restates the position taken by your body yesterday, which in effect is a contention that the contractors and Unions signatories to the Master Agreement do not come within the jurisdiction of the Labor-Management Relations Act of 1947. The proposals you had advanced for meeting the present problem have been considered by the negotiating committee and have been rejected. Your Proposal to continue negotiating wage rates is acceptable and as evidence of the fact, we are continuing to meet with the various unions involved with the purpose of arriving at a satisfactory solution on wage rates prior to May 21st. However, because of the time factor involved, the negotiating committee asks me to advise you that we are at the moment considering taking one of two affirmative actions to prevent the accruing of possible liabilities by any employers [34] involved. This procedure was outlined to you more fully at our meeting yesterday.

It is our sincere hope that this entire matter can be settled amicably, and inasmuch as several of the unions, parties to the Master Agreement have already taken the necessary steps to qualify for union security clauses in their contracts, it is hoped that the other unions involved will follow a similar course so that this particular issue can be resolved to the satisfaction of all parties concerned.

Respectfully submitted,

RENO EMPLOYERS COUNCIL,
/s/ BENNARD C. HARTUNG.

[Endorsed]: Filed May 21, 1948. [35]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the reading and filing of the verified complaint of [36] Plaintiff in this action, and it appearing to the satisfaction of the Court therefrom that this is a proper case for granting a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint be granted, immediate and irreparable loss and damage will result to applicant, before notice can be served and a hearing had thereon, in that the failure or cessation of negotiations between applicant and respondents, as provided for in that certain contract entered into between applicant and respondents on the 24th day of May, 1947, will prevent applicant, or its members, from entering into any other contract with respondents or any of them, or any other person, pending the final determination of this issue; and in addition will cause irreparable loss and damage to all of the citizens of the State of Nevada, due to the insecurity of the applicants and their inability to rely upon continued and constant employer and employee relationship between applicant and the various members of the respondent unions, and that such will interfere with the free flow of interstate commerce.

Now, Therefore, it is by the Court this 21st day of May, 1948, Ordered that the respondents and each of them, and their agents, servants, employees and attorneys and all persons in active concert or

participation with them, be, and they are hereby restrained, pending the further order of this Court, from permitting to continue in effect the letter of defendant, Reno Building Trades Council of Reno, Nevada, and vicinity, to applicant, dated the 18th day of May, 1948; and from issuing or otherwise giving publicity to any notice that, or to the effect that the contract aforesaid, has been, is or will at some future date be terminated, or that said agreement is or at some future date will be nugatory or void at any time during the pendency of this action; and from breaching [37] any of their obligations under the contract of the parties hereto dated the 24th day of May, 1947, and from coercing, instigating, inducing or encouraging by economic pressure or otherwise, the members of the various respondent unions in the state of Nevada, or any of them or any person to interfere by slow-down, walkout, cessation of work or otherwise with the operation of the businesses of the members of the applicant by continuing in effect the aforesaid letter or by issuing any notice or termination of agreement, or through any other means or devices; and from interfering with or obstructing the negotiations between applicant and defendants, pursuant to the contract aforesaid; and from taking any action which would interfere with this Court's jurisdiction, or which would impair, obstruct or render fruitless the termination of this case by the Court; and it is further ordered that this restraining order shall expire at 12:00 o'clock M. on the 31st day of May, 1948, unless before such time this order for

good cause shown is extended, or unless the respondents consent that it may be extended for a longer period; and it is further ordered that respondents appear before me and show cause why a preliminary injunction to the same effect should not be issued on the 28th day of May, 1948, at 10:00 o'clock A.M. thereof, at the Court House in Carson City, Nevada.

The bond on this restraining order is hereby fixed at \$1,000.00 until the further order of the Court.

Dated: May 21, 1948 at 4 o'clock P. M.

/s/ ROGER T. FOLEY,

Judge of the District Court of the United States
of America, in and for the District of Nevada.

[Endorsed]: Filed May 21, 1948. Refiled May 22, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now come the defendants above named, represented by their counsel, Morley Griswold and George L. Vargas, esqs., with [39] the exception of Defendant Local Union of Operating Engineers, No. 3, and appearing especially for the purpose of resisting the Order to Show Cause and Restraining Order hereinbefore issued from the above entitled Court in the above entitled cause, and moves the Court as follows:

I.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that the said complaint upon which said Order to Show Cause and Restraining Order is based does not state facts sufficient to sustain the said Show Cause and Restraining Order.

II.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that the same is issued upon the complaint based upon information and belief.

III.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that the above entitled Court lack and did lack jurisdiction to make and issue said Order to Show Cause and Restraining Order and to continue the same during the period set forth in the Order and until final adjudication of the above entitled case.

IV.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that it appears on the face of the complaint that the plaintiffs are not proper parties plaintiff in the said action and have no capacity to sue.

V.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground

that Defendant Building and Construction Trades Council of Reno is not a proper party to the complaint. [40]

VI.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that Defendant Operative Plasters and Cement Finishers Local Union Number 241 is not a proper party to the complaint.

VII.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that it is improper as to all of the named defendants.

VIII.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that the Court lacked jurisdiction to grant the relief sought by reason of the Norris-La Guardia Anti-Injunction Act, Act of March 23, 1932, 193, C.90, 47 Stat. 70, 29 U.S.C.A., Secs. 101-115.

Wherefore, defendants, and each of them above named, pray that the said Order to Show Cause and Restraining Order be vacated.

MORLEY GRISWOLD,
GEORGE L. VARGAS,
Attorneys for Defendants.

[Endorsed]: Filed May 28, 1948. [41]

[Title of District Court and Cause.]

ORDER

A temporary restraining order having heretofore been granted without notice, the Motion for preliminary injunction was set down for hearing on this 28th day of May, 1948, in the courtroom of the above [42] entitled Court in Carson City, Nevada, and after hearing counsel

It Is Ordered, Adjudged and Decreed that the application for preliminary injunction be, and the same hereby is, denied and that the temporary restraining order heretofore made and entered is hereby dissolved and vacated upon the grounds and for the reasons stated by the Court in ruling upon said Motion.

Dated: This 28th day of May, 1948.

ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed June 2, 1948. [43]

[Title of District Court and Cause.]

ORAL OPINION OF THE COURT

Made and Entered May 28, 1948:

The Court: "I am ready at this time to rule on the question of the motion you made this morning, Mr. Brown.

At the beginning of the session this morning, Mr. Brown, on behalf of the petitioner, moved the Court for a preliminary injunction to preserve the status

quo and that is a matter that we have discussed and considered throughout the day. Now, on the 21st day of May the Court made its order to show cause and issued temporary restraining order. The order to show cause required that the respondents appear before the Court and show cause why preliminary injunction, to the same effect as the restraining order, should not be issued, on the 28th day of May, 1948, at 10:00 o'clock. At the time the application was made for the temporary restraining order, the Court's attention was called to the case of United Mine Workers of America, 330 U. S., 258 and in the course of its opinion the Supreme Court of the United States in that case stated:

“In the case before us the district court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief.”

In that case the defendants determined the law for themselves and did not heed the injunction of the district court [45] or the restraining order of the district court and violated it and they were held in contempt.

Now I feel that this is the same situation we have here. If this order that was made May 21st had been violated by any of the persons to whom it was directed, I wouldn't hesitate to act. I wouldn't hesitate to punish for contempt any person or persons or organization who violated that restraining order, under authority of the United States vs. United Mine Workers, on the theory that this court, and any other court, has a right to hold matters in

status quo until the Court has opportunity to decide the questions involved, questions of law, and that was the purpose I had in issuing the preliminary order, temporary restraining order, in this case.

Now we have had an opportunity to hear from counsel on questions of law concerning the issuance of temporary restraining order or preliminary injunction. I can't understand how it could be said that there is no labor dispute involved here. I think counsel has stated that the purpose of this is to prevent labor dispute from arising, or series of labor disputes from arising, so then we are, of course, interested, involved here, in consideration of labor disputes, not existing now, but contemplated in the future. Before the so-called Taft-Hartley law was enacted, and which is merely an amendment of the National Labor Relations law, the National Labor Relations law was in general the same kind and class of legislation as the Taft-Hartley law, and when complaints were made before the National Labor Relations Board, the employers complained of frequently questioned the jurisdiction of the National Labor Relations Board. Many cases are shown in the annotation to the different sections, having to do with the law before the enactment of the Taft-Hartley law, that the defendants or respondents, as they might have been called, raised the question of the jurisdiction of the National Labor Relations Board, claiming that they were not involved in interstate commerce or their activities did not affect interstate commerce. One of those cases is the National Labor Relations [46] Board vs.

Van de Camp Packers in the Ninth Circuit, 152 Federal Reporter, Second Series. This is in the circuit court of the Ninth Circuit. The Board petitions for the enforcement of its order. The company contends first that the National Labor Relations act is not applicable, since it is not engaged in interstate commerce. It was decided there that that particular case was without merit.

Now suppose some controversy does arise here. What is there to prevent the petitioner from filing a complaint with the National Labor Relations Board, complaining about some alleged unfair labor practice of one of these unions, or of a group of these unions? Then the union or unions involved could raise before the National Labor Relations Board the question of whether or not it was involved in interstate commerce, or whether its activities affected interstate commerce. Then the National Labor Relations Board could determine whether or not it had jurisdiction of the case and the party dissatisfied could take the matter to the Circuit Court of Appeals.

Cases of jurisdiction of the National Labor Relations Board have, I think, in the past always been cases first to the Board and then afterwards carried into the Courts. I feel that whatever restrictions placed upon the courts by the Norris-LaGuardia bill still exist, unless we can find that they have been lifted by the present act, the Taft-Hartley Act, so we have to look to that Act to see what the power of this court is in regard to the issuance of restraining orders and the exercise of the injunctive power of the court.

This action is brought under the declaratory judgment statute. Now if the Court couldn't, under the same set of facts as appeared in this complaint, issue an injunction in an action for damages, or an action for any other kind of relief, it couldn't issue an injunction in a declaratory judgment action. Petitioner may or may not be entitled to maintain an action to determine whether or [47] not any or all of these labor organizations are subject to the Taft-Hartley act. Whether such an action can be maintained is not now before the Court. The only question before the Court is whether or not this preliminary restraining order should be continued or whether a temporary restraining order or preliminary injunction should be issued pendente lite, and that is the only point I am attempting to decide.

Here is the holding of this court: That this court is without power to continue the present restraining order in effect and it is without power to issue, as prayed for, restraining order or preliminary injunction pendente lite, without prejudice at all to any other proceeding in this case, and that is the order of the court." [48]

[Title of District Court and Cause.]

HEARING ON ORDER TO SHOW CAUSE

Be it remembered, That the above-entitled matter came on regularly for hearing before the Court at Carson City, Nevada, on Friday, the 28th day of May, 1948.

Appearances: Brown & Wells, by Ernest S. Brown, Esq., Robert W. Wells, Esq., Theodore Hough, Esq., Attorneys for Petitioner. Griswold & Vargas, by Morley Griswold, Esq., P. H. McCarthy, Jr., Esq., Attorneys for Respondents. Louis A. Penfield, Esq., representing National Labor Relations Board.

The Court: Gentlemen, in the case of California Associations of Employers vs. the different labor organizations, are you ready to proceed at this time? I am very glad to grant the privilege of attorneys here in this particular litigation and as far as being an observer, Mr. Penfield, I welcome your participation in these proceedings.

Mr. Penfield: I wish to make my presence clear, your Honor, in that connection. As you know, the Board has not at this time filed any motion to intervene or stated to what extent [52] it desired to participate. I believe your Honor did talk with some of our representatives in Washington and they did indicate to your Honor there were two basic questions in which they did have considerable interest. There are many other issues here and at this time I do not wish to ask for a continuance or in any way interfere with these other matters being considered, but I believe your Honor is familiar with the basic issues in which we are interested.

The Court: I will be glad to hear any expression you desire to make during the course of these proceedings.

Mr. Penfield: If I can be of any assistance, I shall be glad to do so.

Mr. Griswold: On behalf of the defendants, at least, if Mr. Penfield has any suggestions to make, or the Court, I would appreciate the same and as a friend of the court he would be more than welcome and I assure your Honor no objection or exception will be taken, insofar as the defendants I represent are concerned, so Mr. Penfield is more than welcome.

The Court: Mr. Griswold, do you represent all the defendants named?

Mr. Griswold: No, I do not. There is one defendant particularly that I do not represent. That is the Local No. 3 of the Engineers. That Local is represented by Mr. McCarthy. The rest of the named defendants I am authorized [53] to speak for.

The Court: Now, Mr. Brown, I understand perhaps the burden is on you.

Mr. Griswold: Your Honor asked a question. I know your Honor likes to handle these matters as expeditiously and informally as the rules will permit. My thought in the matter is this—I believe that the show cause order puts the burden on us to show the cause. However, I do believe that the restraining order, having issued without affidavits being attached, that counsel for the petitioner should introduce the complain in evidence, together with the exhibits that are attached hereto, thereby having before the court, in the form of evidence, the complaint and the exhibits. Now on behalf of the defendants I represent, I will consent that the exhibits, although there has been no oppor-

tunity of cross-examination, may be introduced in evidence and that the signatures thereto be true signatures and the parties making the various exhibits have authority to so make the exhibits, not binding ourselves or counsel on the other side to the truth or the untruth of the exhibits, with the right of putting in testimony, if it becomes necessary, in connection with those exhibits.

Now I suggest further, for the purpose of expediting this case, that there are probably two other documents that should be made exhibits in this complaint. One is a letter that was written on the 21st day of May and delivered before [54] the filing of the complaint. That was written by my clients. And the other is a reply that came to that letter, that was delivered to us after the 21st day of May and may be without the issues, but I believe for the purpose of expedition that it should be also put in—one is a letter from my clients, the other is a letter from Mr. Brown's clients in this matter, and I suggest and offer to have those admitted as exhibits, under the same statement that I made with references to the other exhibits that are attached to the complaint, and then we can proceed on an argument of law, if we so desire.

Mr. Brown: May it please the Court, we appreciate the recommendation of counsel, but it occurs to us at this time, upon what theory is counsel in this matter? I mean, as far as the pleadings are concerned. Mr. Griswold said he represents the respondents. We find no motion to dismiss, we find no motion to dissolve, we find no answer, and we

believe that under Rule 65, upon the burden of proof being assumed by the petitioner, we should go ahead on our prayer and our showing in our verified complaint, wherein we ask for a preliminary injunction, and in pursuance to the allegations of our verified complaint and the prayer therein, we now formally move this Court for a preliminary injunction pendente lite to preserve the status quo under the terms of Exhibit A attached to our verified complaint, until this case is at issue and until such time as your Honor has had an opportunity to determine your [55] jurisdiction and the other matters that may be presented on the merits of our prayer for declaratory judgment, and we are prepared to go forward with our burden on that proposition.

Mr. McCarthy: I believe, as I understand it, counsel for petitioner has moved your Honor to grant an injunction pendente lite and I assume—of course, we are interested in having this record correct—I assume that that motion is based upon the complaint. Am I correct?

Mr. Brown: Yes.

Mr. McCarthy: And I assume in basing it on the complaint that the complaint is before the Court, as in any case which you have, in support of that motion, as of this moment.

Mr. Brown: May it please the Court, that is not all of it.

Mr. McCarthy: I said as of this moment.

Mr. Brown: May it please the Court, first I may suggest there is also in the record of this case the

ex parte record of the testimony which myself, as witness and counsel for the petitioner, did have transcribed and presented to your Honor on application for ex parte restraining order.

Mr. McCarthy: If the Court please, we will, on behalf of Local No. 3 of the Operating Engineers, object to your Honor considering in this proceeding any oral testimony taken out of the presence of the parties, out of the presence of counsel, where there was no opportunity to cross-examine, and [56] if counsel's remarks constitute an offer of evidence at this stage, we will object to the introduction of the same, upon the ground we have had no opportunity to cross-examine the person therein testifying and as such it is incompetent, irrelevant, and immaterial in this proceeding.

Mr. Griswold: May I join with counsel and add to that up to the present time there has been no service of any of that testimony upon any party that I know of.

The Court: That testimony of Mr. Brown was taken upon his application for the restraining order, which was granted, and that all that it was offered for and that is all it has been, and will be, considered by the Court for, unless it is again offered in these proceedings and if it is, you will have opportunity to cross-examine Mr. Brown.

Mr. McCarthy: Now, if the Court please, counsel having stated the position of the petitioner, our appearance here at this time on behalf of Local 3 is a special appearance, for the purpose of respectfully challenging the jurisdiction of this court to

issue the order to show cause in the first instance on the restraining order. I do not think it is necessary at this moment to burden your Honor with argument, which will come in due course. Sufficient to say we take the position that your Honor, by virtue of the statutes of the United [57] States, does not have the authority to issue the order in the first instance, that the restraining order was unauthorized; that, in addition, the complaint does not state facts sufficient to constitute a cause of action or to support the issuance of the restraining order; that, as a matter of fact, from the face of the complaint, it appears that this plaintiff can not state a cause of action against Local 3 or any of these defendants, no matter how it might amend that complaint. As I say, there is no intent at this moment to burden your Honor with argument, but I would like the record to be clear that the first issue we present is the jurisdiction of this court, not as of today, but as of the moment that the order was signed. Thank you.

Mr. Griswold: I call to your Honor's attention, and not in the way of argument——

The Court (Interrupting): Could I ask a question of Mr. McCarthy before you proceed. You say, "as not of today." You also contend that the Court would have no authority to grant the motion made by Mr. Brown?

Mr. McCarthy: That is right. Our position is that your Honor did not have jurisdiction at the beginning and, of course, therefore, could not have jurisdiction at any proceedings.

The Court: No jurisdiction to continue or authorize [58] temporary injunction pendente lite?

Mr. McCarthy: We ask to vacate the order. Of course, everything else, then, would naturally fall by the wayside.

Mr. Griswold: Upon other matters similar to that raised by Mr. McCarthy, I call to your Honor's attention that the complaint as it stands, the parties who are parties plaintiff and the parties who are parties defendant, are shown upon the complaint to not be the real parties in interest and to not have the right to bring this suit and the defendants are not bound by anything that is in the complaint and it shows on the face of the complaint. Incidentally, we understood we would be here at 10:30 and my brief case and motions will be presented in due course. I made the suggestion to counsel only for the purpose of expedition. Evidently I made the wrong motion, because it does not look to me like we expedited at all. If he does not want to do that, then we will proceed.

The Court: If counsel can agree upon the order of procedure, the Court will gladly conform to the agreement, if it can be made, and if it can not be made, we will then try the opposite method of procedure.

Mr. Brown: May I offer a suggestion to the Court and counsel to assist? Apparently from what Mr. Griswold just suggested, there are some written motions or something which they intend to file, which may present something to your Honor that [59] your Honor may feel should be heard prior

to the hearings of the motion which I have orally made this morning, and may I respectfully suggest that we take a 10 or 15 minute recess in order that counsel on the other side may serve us with such either written motions or what have you, and in order that counsel may clear relative to what we may stipulate, which may save the Court's time on the matter of defense.

Mr. McCarthy: May I suggest to your Honor where Local 3 is concerned, in view of the shortness of time and in view of the fact that our headquarters are in San Francisco, we are in no position to file written motions at this time. However, we are prepared to stand on our oral motion in respect to jurisdiction and may we respectfully suggest to this Court, since jurisdiction is fundamental, and particularly so in a district court of the United States, it is hardly proper we should consider anything else until we dispose of the question of your Honor's jurisdiction.

Mr. Griswold: I join in that. We are in position if necessary, which we do not admit, to file motions to dismiss and strike upon the grounds upon which we will proceed, but my suggestion—it wasn't a motion—my suggestion was in order to get grips on this, so we would know what we were doing. This restraining order and preliminary injunction is asked on what? As far as we know, upon the complaint. Now let's get it before the Court. [60]

The Court: It is evident to the Court counsel can not agree upon the way we will proceed, so I am going to indicate how we will proceed. The bur-

den is going to be upon Mr. Brown's clients to show this Court that the Court had jurisdiction to issue the order that has been issued and to issue a preliminary injunction pendente lite, and also to show this Court the Court has jurisdiction of this action. So the burden is placed upon Mr. Brown and I think that can be done without any written motions or pleadings, just on questions of law that will be presented. That is my suggestion.

Mr. Brown: We are ready to go, your Honor.

The Court: So we wouldn't need that 10-minute recess?

Mr. Griswold: Right.

Mr. Brown: May it please the Court, of course, at this time our first bit of evidence that we desire to present is our verified complaint, which is on file herein, but in order to expedite and to suggest to the Court in reference to our theory in this particular matter, and with the reservation of the right to go forward with our burden on the facts, we desire to outline our legal theory of the case very briefly.

This matter is a very simple matter. We have filed a [61] complaint, in which we have alleged that there exists an actual controversy. We have, therefore, predicated our jurisdiction upon two propositions. The first proposition—I will present the Court with a memorandum that may be of assistance—our first proposition, may it please the Court, is this: We want to make the distinction between Title 28, Section 400, which provides for a remedy, to-wit, a declaratory judgment in the federal court, and the question of jurisdiction itself. The juris-

diction of this suit is based upon Title 28, Section 41(8), upon the theory that any suits and propositions arising under any law regulating commerce is within the jurisdiction of this Court. In the memorandum, on page 4, the Supreme Court of the United States, in the case of American Federation of Labor vs. Watson, 90 L. E. 873, that was a case where a number of——

The Court: You do not know the citation of the United States Supreme Court?

Mr. Brown: No, I will have Mr. Wells check that for you. But here was the situation in that case. Florida had passed a railroad closed shop amendment to their State constitution. A number of local labor unions and people engaged in interstate commerce petitioned the federal district court for restraining order against Watson, attorney general for the State of Florida, who had brought certain proceedings and seeking a permanent injunction under a bill in equity. Among other questions that [62] came up was the question of whether or not the federal district court had jurisdiction of that case. The Supreme Court of the United States said it involved an alleged conflict between the National Labor Relations Act and the Constitution or laws of Florida. The Supreme Court in that Watson case said, and I am quoting from our memorandum, in answering the proposition of jurisdiction: (Reads from memorandum.)

Now since the federal court has jurisdiction of suits and propositions arising under any law, meaning any law of Congress, relating to commerce, we now invite the Court's attention to page 2 and 3 of

our memorandum, wherein the Labor Management Relations Act of 1947, which colloquially may be called the Taft-Hartley Act—is an act—this is at the bottom of page 2) Sec. 1(b) (Reads). Then we turn over to Sec. 101, found on page 3: (Reads.)

In other words, Title 28, Section 41(8) says that that type of controversy involving interstate commerce is within the jurisdiction of the federal court. We contend that the Labor Management Relations Act, which we have alleged is applicable to the parties and transactions to the contract marked Exhibit “A” to our complaint, is squarely a matter within the federal court’s jurisdiction.

Now may I make this position clear to the Court and for the information of counsel. The Court, having jurisdiction, we then are seeking a remedy, and we have sought that [63] remedy under the federal declaratory judgment act, which is Title 28, Section 400. Now under that particular section we are contending that we have pleaded an actual justifiable controversy, which is now ripe for decision, and what is that controversy? That controversy is simply a proposition of whether, in negotiating and bargaining between the petitioner, its members and respondents, this book of rules applies, to wit, the Labor Management Act of 1947, or whether this book of rules, which is your State regulations of labor, applies. We have predicated our position in our complaint upon the proposition that people and the industry are involved in interstate commerce, that the Taft-Hartley Act applies, that we can’t negotiate or bargain any further without subjecting

ourselves to penalties under that act and under the decisions of the Supreme Court of the United States an actual controversy is presented. Now what is that controversy? It does not involve any restraint upon the National Labor Relations Board, nor does it involve any interpretation of the Taft-Hartley bill, nor does it present a labor dispute, your Honor. It is just simply a question of whether or not these people are within the provisions of the Taft-Hartley Act or whether they are not.

Now in view of that situation——

The Court (Interrupting): May I ask you a question right here—do you mind?

Mr. Brown: Not at all. [64]

The Court: Just assume that we are under the provisions of the Taft-Hartley Act, for argument here, consideration—wouldn't the proper procedure be on the part of the respondents or petitioners to file a complaint with the National Labor Relations Board?

Br. Brown: It would not, your Honor, and I will tell you why it wouldn't. It is alleged, in the first place, in the complaint, as an exhibit, that petitioners have asked the general counsel of the National Labor Relations Board for an opinion. He said it is a controversial matter and no opinion would be given. Now in the second place, the only time you can petition the National Labor Relations Board is when you are authorized to do so under that act, and the petitioners here are not permitted to petition on questions involved in this particular dispute. In other words, before the petitioner can

bargain under the Taft-Hartley Act, in reference to a union security clause, there must have been a petition by the unions for the purpose of changing an allegation on the part of their members upon the question of whether or not their representatives and bargaining agents would be authorized to have a union security provision in the contract. There is no unfair labor practice. The Board has no jurisdiction in this matter. This matter, may it please the Court, is just as simple as though we were asking your Honor if we were an interstate carrier or if [65] there were a question as to a direct line company, whether we were under, say intra-state, and we came in under petition asking for a declaratory judgment, whether this petitioner, by reason of being engaged in certain factual operations, were governed by the interstate commerce act or whether it was entirely within the jurisdiction of the Nevada State statute, public service commission, and once having decided that, any further proceedings or any further practices in respect to the operations of the petitioner respondents in their labor relations, management relations, would then be a matter that would have to be proceeded orderly and in accordance with the Taft-Hartley Act and perhaps before the Board. This is merely a well-recognized procedure under a declaratory judgment. The most enlightening article on this very thing is found in the last issue of the American Bar Journal.

Mr. Haugh: If the Court please, while Mr. Brown is finding this, I would like to suggest this, that in reference to your question, if that appear

to be true, that we are then entitled to the judgment we have asked for now, because we must presuppose that the Taft-Hartley Act applies to our operation before we give any consideration to what rights the parties may have under it.

The Court: Your suggestion raises another thought in my mind now. I do not like to interrupt the trend of counsel's argument by questions and if [66] it annoys counsel, I won't do it.

Mr. Brown: It does not. We are interested in getting at the facts and the law.

The Court: But the National Labor Management Act of 1947 is an amendment of the existing National Labor Relations Act. Now what was the situation in regard to the Norris-LaGuardia Act prior to the enactment of the so-called Taft-Hartley law?

Mr. Brown: May I answer that right here, Judge. Our position, may it please the Court, is this: before anybody can get up on his hind legs and assert any limitations upon jurisdiction of this court by reason of any of the federal anti-injunction acts, they have to demonstrate by proof to your Honor two propositions; first, that the plaintiffs and respondents are doing business in interstate commerce or they are not applicable. They were, true, under the old National Labor Relations Act, because the old act did not apply to every industry or every employer——

The Court (Interrupting): I want to tell you what my idea is right now, so that you can follow your argument along that line. I have an idea my-

self on this proposition and that is that the National Labor Relations Act and the so-called Taft-Hartley Act did not repeal the Norris-LaGuardia Act. [67]

Mr. Brown: We agree.

The Court: Then if this Court has any power to issue an injunction in labor matters, that power must be conferred by the Taft-Hartley Act or it does not exist. That is my view.

Mr. McCarthy: May it please the Court, the Supreme Court last week finds on this exact problem and counsel has the record.

The Court: I do not want to interrupt counsel, but that is the way I feel right now. If this Court thought the Norris-LaGuardia Act is still law, then the Court, if it has power to issue a restraining order against labor, must find it in the Taft-Hartley Act or it does not exist. Now that is my feeling.

Mr. Brown: May it please the Court, your proposition is answered in the United States Supreme Court, United States vs. United Mine Workers. It is found—now, may it please the Court, apparently you like to have the United States citations——

The Court: Just a moment. Let me follow that with another subject. That gives us another question, of whether the United States government was an employer, that is where the government was involved. [68]

Mr. Brown: That wasn't all of it. May I suggest this, I have read this case a dozen times and I may not be able to analyze it as ably as the Court or other counsel, but here was the simple proposition. Lewis was president of the United Mine Workers

Union. They had a contract at one time with the owners of the mine, had a collective bargaining contract, then the government took over the operation of the mines. Mr. Krug, Secretary of the Interior, in that particular case was then called in in negotiation relative to the continuance of terms of the contract and its termination by Mr. Lewis and after they had debated the matter and negotiations for a while, Mr. Lewis wrote a letter to the Secretary of the Interior, in which he said, "This contract is terminated on the 20th of November." Immediately the United States then petitioned the federal district court and asked for the very same thing that we are asking for. They asked for a simple declaratory judgment that whether or not Mr. Lewis had the legal right, under the circumstances pleaded in their petition, to terminate the contract. They also prayed for a temporary restraining order. Now Chief Justice Vinson, in writing that majority opinion, did say, it is true, that there was a distinction because the United States was a petitioner, there was a discussion and a decision about the fact that the government was not included within the Norris-LaGuardia Act, but Chief Justice Vinson, on page 910 of 91 Law Edition and in the majority of the opinion [69] presents the very proposition that we are contending for. If we fail on this proposition, we are through and it is our position that until this Court has an opportunity to determine its jurisdiction and whether or not this business is a labor dispute, and that presumes a decision upon the merits on this particular question, it has the

inherent right, by virtue of being a court, to enjoin and maintain the status quo. (Reads: "Although we have held that the Norris-LaGuardia Act did not * * *").

Now the Union in that case, and Mr. Lewis, contended may it please the Court, that there could be no punishment for violation because under the Norris-LaGuardia Act and Clayton Act the federal court was without jurisdiction to issue temporary restraining order for which these people were subject to being punished for violating. Now then Justice Vinson says this: (Reads: "Attention must be directed to the situation * * *").

Justice Frankfurter did disagree with the majority of the court upon the proposition that said this is not a labor dispute under the Norris-LaGuardia Act because the government is a petitioner and for some other reasons. Justice Frankfurter said, "Well, I do not agree with the majority. I think this is a labor dispute. It all arose out of the so-called Krug-Lewis agreement, and I feel the court has not authority on the merits to give injunctive relief without complying with the Norris-LaGuardia Act, but Mr. Justice Frankfurter agreed in the opinion of the court, the majority upon this proposition: (Reads: "And so I join the opinion of the court * * *"). Meaning this Lewis case, where the government had asked for a declaratory judgment. Mr. Justice Frankfurter says: (Reads: "In the case before us the district court * * *").

Now counsel would have us believe, and the Court has intimated, that although this temporary re-

straining order was issued without any jurisdiction, that this Court has no injunctive power——

The Court: The Court has not intimated that.

Mr. Brown: I don't mean it that way.

The Court: And I will say I agree with the views of this present case, *United States vs. United Mine Workers* and the Court has acted under that case in issuing this preliminary restraining order, and I would like to go further, if there had been any violation of the restraining order issued, I would not have hesitated to punish the person who violated it for contempt, but now we have got to the point where we are going to determine whether or not this Court has jurisdiction to continue the present order in effect or to issue a preliminary injunction and we exercised what we thought were our powers under the *United Mine Workers* case, issued the preliminary restraining order to hold matters in status quo until today. [71]

Mr. Brown: May I make our position clear in that respect. May it please the Court, we take this position, that your Honor is in the same position at this moment, right now, as you were on the 21st of May, 1948. There is nothing before your Honor other than a complaint. Now if counsel for the respondents assume that this Court has no jurisdiction whatever to entertain our motion for a preliminary injunction to maintain the status quo, then counsel has got to concede that the parties to Exhibit "A", the master contract, and our people are engaged in interstate commerce and if they are the Taft-Hartley Act applies and if the Taft-Hartley

Act applies, that is all in the world we are seeking. If this Court were in a position right now to say from the record of this case and the pleadings of our people are engaged in interstate commerce, therefore the Taft-Hartley or the federal statute applies, that terminates this controversy. There is no need for a continuation of the temporary order, there is no need for a preliminary injunction, but until the Court does determine that—that is all we want, a simple order that we are engaged in interstate commerce and we are governed by the Taft-Hartley law, and then we will go ahead, it is *res adjudicata*, but until the Court makes that determination, it seems to us, may it please the Court, that two things must be determined by this Court—first, if we are engaged in interstate commerce must be determined first, because if we are not, then your Norris-LaGuardia [72] and Clayton and injunctive statutes do not apply. In other words, even if we are, there are exceptions to the Norris-LaGuardia Act and the Clayton Act. In those cases which do not involve a labor dispute, the court is not precluded.

The Court: I am going to tell you how I am presently inclined. Unless you can show this Court that this Court has jurisdiction, power and authority to issue an injunction or restraining order, in the face of the Norris-LaGuardia Act and as it stands now, affected or not affected by the Taft-Hartley law, I am going to set aside the restraining order. That is the problem I want to have shown to me. That is the way I feel now. Let counsel finish

his argument. That Norris-LaGuardia Act restricts the power of the federal court to issue injunction in labor disputes and as far as the remaining features of this case is concerned, the question of determining whether or not the defendants or respondents are subject to the terms of the Taft-Hartley Act, is another question.

Mr. Brown: Your Honor, the Norris-LaGuardia Act is Title 29 and Section 113 of that act is the section which defines the legislation under the Norris-LaGuardia Act to issue injunctive relief. [73]

Mr. Griswold: May I ask counsel a question in that respect. Have you considered Section 107, which has to do with labor acts? Section 113 is not the section, I do not believe. Section 107 is the section that has to do with issuance of injunctions, not labor act.

Mr. Brown: Section 105 of Title 29 provides as follows: (Reads) Now turning over to Section 113, we have certain definitions in the act. Dropping down to (c) of 113: (Reads) Now this Court is not deprived of its injunctive relief for that petition under declaratory judgment, for the reason there is no labor dispute involved in our complaint, as contemplated in Section 113(c). In the first place, it has not been proven, the record does not disclose it—all we are asking for is this: Is the operation of this industry interstate, and by virtue thereof does the federal statute apply? We are not asking for any adjudication of anything else. It is true, may it please the Court, in paragraph, I believe VII, we have talked something about wages and hours and

things of that kind, but the only purpose of those sections were merly directed to the proposition of showing irreparable injury. The only thing we are asking for in this case is whether or not the federal statute governs. If it does, we are not asking for the Court to do anything under the federal statute. We are not asking for an interpretation of it. There is no labor dispute. There [74] can be no labor dispute. If there is a labor dispute and this Court enters a declaratory judgment covered by the Taft-Hartley Act, then the respective parties to the case, respondents and petitioners, must then pursue their remedy before the National Labor Relations Board.

The Court: Suppose the Court did decide immediately, right now, that these defendants were subject to the Taft-Hartley Act——

Mr. Brown: Your Honor, this is the only issue.

The Court: Then there would be no restraining order?

Mr. Brown: Nothing more there. That is all we are asking for.

The Court: So if the Court dissolves the temporary restraining order pending hearing on the other issue, you will be in no worse position than you would be if the Court immediately decided that defendants were subject to the Taft-Hartley law?

Mr. Brown: Your Honor, we feel that upon the proof which we intend to offer your Honor, assuming your Honor feels you have jurisdiction to entertain our motion for a preliminary injunction, not only the allegation of our complanit, but we maintain, may it please the Court, that unless the status

quo is maintained until the Court issues an order one way or the other, that there will be a complete termination of Exhibit [75] "A" and all of the rights of the petitioner, and also the rights of the respondents, will terminate under that thing. Now if the Court were in a position today to say the Court enters the order and finding from the record petitioners, members of the contractors, engage in interstate commerce, the Labor Management Relations Act of 1947 applies, then, right then and there, the status of these people, without subjecting themselves to any penalties under their contract or under the Taft-Hartley law, would then be permitted, under a judgment which becomes *res adjudicata* in regard to states to handle their own labor management affairs under the Taft-Hartley Act. There is no labor dispute here.

Our thought, your Honor, is that the purpose of a declaratory judgment is to have the determination without incurring of penalties of any kind, and if we could get to the merits, we would be willing to try the merits right now, if counsel is ready to go to bat on it, and in view of the fact the restraining order at this time extends to the 31st, if we could conclude our trial today and tomorrow morning on the simple question of whether the act is applicable or not and the court enter its declaratory judgment, it would perhaps obviate the necessity of going into a collateral injunctive hearing and it would also terminate the controversy.

Mr. McCarthy: May it please the Court, might I ask counsel through the Court, if the Court will

permit me a [76] question, and that is this: Counsel stated there is no labor dispute and I think he means it seriously. What troubles me here, why are my clients refrained from striking or slowing down or walking off the job if there is no labor dispute, and I don't see why, I can't understand why, we should be refrained from doing those things, if there is no dispute.

Mr. Brown: There is no labor dispute within the purview of the statute. The only dispute is, may it please the Court, whether or not these people are so engaged in interstate commerce, or their activities, under an existing contract, so under interstate commerce as to be governed by the Taft-Hartley Act as the rules by which they apply the agreement. There is no dispute over wages, there is no dispute over working conditions, there is no dispute over anything other than whether or not their negotiations and collective bargaining, or whatever they do in their relationship, should be governed by this book of rules or that.

The Court: Let me ask you another question. Under sections 158-529 of the Taft-Hartley law, there was set forth what constitute unfair labor practices and the first division relates to unfair labor practices on the part of the employers, then there is a subdivision (b), which is new—didn't exist in the prior act—recites there shall be a fair practice for labor to do several [77] things; then way down in subdivision (d) on page 17 of the pamphlet of the annotations: (Reads: "For the purpose of this section to bargain * * *"). I thought

that that might, in this provision of the law, when considered with the subject matter of the complaint, might bring this complaint squarely under the theory of labor dispute or under unfair labor practices.

Mr. Brown: No, your Honor, for this reason. The formal way that injunctive relief is obtained is through bill of equity, asking for injunction. This is merely ancillary and the main issue is whether or not this book of rules applies. Now if this book of rules, the Taft-Hartley Act, does not apply, then neither does the Norris-LaGuardia or Clayton Act and the only proposition is first, whether or not we are engaged in interstate commerce. Now if the Taft-Hartley Act applies and then if either party be guilty of an unfair labor practice, then their remedy is to go to the National Labor Relations Board under the labor act, but we are not alleging any unfair practice, we are not alleging anywhere a labor dispute, we are not asking for judgment for damages against these people. The only thing we are asking for is declaratory judgment before our rights are jeopardized, and that was pointed out, may it please the Court, in this power of the Court, under the declaratory judgment act, in a case written by Justice [78] Holmes, Etna Life Insurance Company vs. Haworth, and that is found on page 381 of American Bar Journal, the discussion I am going to read now.

Mr. McCarthy: May we have the United States citation on that?

Mr. Brown: I will find it in a second. I am reading now on page 381 from an article which is a

reprint of an address given by Duval in 1947 before the Judicial Conference of the Tenth Circuit. (Reads.) Then they go on; Haworth contended he had certain rights under the life insurance policy. The company said he didn't. The only way they could determine it was when he died, unless they petitioned it under Title 28, Section 400, the declaratory judgment statute. Then he points out the uses of the declaratory judgment and on page 434: (Reads.) Then dropping over: Reads: "Before following——" and he cites there *Kern vs. Wall*, 306 U. S.

The Court: The point that seems knotty and difficult to me is this: I have an idea—maybe I am wrong—that the Norris-LaGuardia Act encroached upon the equity powers of the court to issue injunctions, just reached in there and took that power out in regard to labor matters. That is the idea I have and I can go along with you on the theory that we can entertain this case under the declaratory judgment law, but as far as accompanying [79] it in any way by means of restraining order, I do not see how that can be done. That is the point that worries me.

Mr. Brown: In this Lewis case in discussion of the majority opinion, it seems clear that the Norris-LaGuardia Act—of course, it does not apply at all unless we have interstate commerce, and if we do, we are entitled to our declaratory judgment, so there is nothing before the court—but in the majority opinion in that Lewis case, I think it was pointed out that, without any fear of contradiction,

the Norris-LaGuardia Act does not prevent the district court from having the power to issue a preliminary injunction, except in certain circumstances. Now one of those circumstances is this, where there is a labor dispute involved. The federal courts held this, may it please the Court, under the old National Labor Relations Act, before the Taft-Hartley Act, they have held that where a union had been certified by the National Labor Relations Board as the bargaining agent with the employer, and that particular bargaining agent and employer had no labor dispute, but, however, a rival union came in and sought to negotiate and bargain and harrass and sought to assume jurisdiction, and where injunctions were asked and where the national unions said to the district judge, "Now, listen, this is a labor dispute and the court has no authority under the Clayton and Norris-LaGuardia Act to issue a preliminary restraining order," the Circuit [80] Court of Appeals—and I will get the citation—in many districts and on numerous occasions have said that there was no labor dispute in those types of matter. There have been a number of cases, two or three of them by the Supreme Court of the United States, where there was some sort of secondary boycott and picketing and there was no labor dispute between the immediate employer and his immediate employees, the Supreme Court has said—I think the *Swing* case is one—there was no labor dispute, even though it arose under the unions, but the most recent case I find is the *Columbia River Packers* by the Supreme

Court of the United States—I have to get that citation, I think it is in 85 or 86 Law Edition. It is Columbia River Packers case, cited by the Supreme Court of the United States. Now there was a case where the canners and processors operating in Washington, Oregon and Alaska did business with the union. They made their bargainings through a union, but also the members of the union, the fishers, were the only people who actually caught the fish and sold the fish to the canneries. Then they went in to the court and sought, under a bill of equity, injunctive relief. The proposition was squarely put up to the court, the court has no jurisdiction under the Norris-LaGuardia Act nor under the Clayton Act, because this involves a labor dispute. They went to the Supreme Court of the United States and it said while the fishermen themselves were organized into a union, that while [81] they, themselves, were independent contractors, yet what they were going to do was strike unless they got a higher price for their fish. The Supreme Court of the United States said that was not a labor dispute within the definition of Section 113(c) of Title 29, hence the Norris-LaGuardia Act did not apply. I will get that citation. I read the case yesterday.

The Court: Was that for the reason that they were independent contractors?

Mr. Brown: Yes, your Honor, it was based entirely upon the proposition that they were independent contractors, even though it shows all the other facts of the case which would indicate a formal labor dispute. Our point in relation to this case

is this—we have no labor dispute even if the court found other federal cases were applicable, because all we are asking for is this, the Court to ascertain, under declaratory judgment, are we governed by this book of rules or that, so that we can operate under an authority decision of a court of competent jurisdiction after determination under the jurisdictional process that we are under the Taft-Hartley Act, so that our penalties and rights are not a matter of question. We say there is no labor dispute, but until there be a labor dispute it must be proven, as a defense to the jurisdiction in this particular case, because I respectfully suggest, under the Lewis case right now there is nothing in the pleadings or motions or anything else [82] before this court that demonstrates a labor dispute.

Mr. Griswold: May it please the Court, just briefly; well, I don't know, if there is no labor dispute, there certainly is no other kind of dispute in there. If that is true, I think we have been unjustly restrained from doing something or other, whatever it might be. I can't make out what this is if it isn't a labor dispute. It certainly has taken in practically all the unions in northern Nevada and other labor unions and they have been restrained. Now if they haven't been disputing with anybody, if they haven't been doing anything in the way of labor dispute, why in the world are they restrained? This court certainly does not go out and restrain people unless there is some kind of dispute. When you have an employer-employee situation and they have difficulties, why they are disputing and they

are disputing over the employer-employee relationship and it is a labor dispute. Now in the complaint they say they refuse to bargain. If that isn't a labor dispute—clearly, this comes within a labor dispute.

Now, let us see. Get off the law for a moment. Just look at this complaint. In the first place, it is by the California Association of Employers, a California corporation, doing business as the Reno Employers Council. Now let us look at what they claim to be the master agreement, and this, incidentally, is upon the jurisdiction question, because if you do not have, under that master agreement, the signatures of [83] parties to be bound—and there are parties who are enjoined here who are not parties to the master agreement but have other and separate and different agreements—certainly this Court is without jurisdiction to go out and pick any of those fellows out of the air and bring them in and enjoin them and restrain them. Let us just look at that master agreement and this complaint, because I think this is very important. Now it was supposed to have been signed by whom? The contractors, by Roy B. Flippin, representing general and/or independent contractors. Now that is the signature to the master agreement. It is not the signature of the California Association of Employers, a corporation. Let us say that Mr. Brown and I get together and we both have a client and we agree among ourselves that we want to sell our client's mine to Mr. Smith, so we act as bargaining agent between the two parties, but they have to sign the contract, haven't they, to sell it? This major contract was not signed by the California Employers

and that is the basis of their lawsuit. Let us go to just the next step, and that is this. We have enjoined here the Building and Construction Trades Council of Reno. Now the Building and Construction Trades Council of Reno is merely a bargaining agency and on the face of the contract—and I call this to your Honor's attention while we are at it—on the first page of the master agreement, refer to that again, right on the first page: [84]

“* * * and the Building and Construction Trades Council of Reno, Nevada, and vicinity, and its various affiliates for the counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka Counties, all affiliated with the American Federation of Labor, who accept for themselves, * * *”

Who must accept for themselves. In other words, each union, may it please the Court, on the face of the contract, must enter into its own contract with its employer.

Now let us go a little further. Let us see how many of these unions entered into that master contract and when they did enter into it, let us see how they entered into it. You have the hod carriers, you have the United Brotherhood of Carpenters, and then there is the Hod Carriers Union again, that is the same one, and I believe we have four. Now only four of these unions who are enjoined were parties signatory to the master agreement. Let us see what that said. We can use the first one.

That is on the hod carriers and near the bottom; now they accept the master agreement:

“It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our [85] Union and/or the working agreement entered into between the General Building Contractors of Reno and Local 169.”

Nowhere in this complaint is the jurisdictional fact presented of what is in the by-laws and the working agreement. Now that is the reason that Mr. McCarthy is here. He represents the Engineers Local No. 3. They are not members of the master agreement. They have their own individual contract with their own employers, and that is true with the exception of three of these unions, three I believe, four at the most. So what happens? Can the jurisdiction of this court, under the pleadings of this complaint—so far as those unions are concerned, they never signed the master contract, they are not a party, they have their own individual agreement with their employers, and still they are in here on what we say is an excess of the jurisdiction of this court, to answer to this court after having been restrained. Now I am talking the practical facts of the matter on this now and I will come to the law in a moment.

Now here is the California Association of Employers, the plaintiff in this action, who is not a signatory to that master agreement, who is not a party to these other agreements to Local No. 3, which is represented by Mr. McCarthy, who is not

a party signatory to the agreement entered into with any of the other unions, who is not even a signatory to the master [86] agreement. Nevertheless, they are the parties plaintiff. Now are they the real parties in interest on this? No. They are merely the bargaining agent, as it is shown on the face of the complaint and as they allege in their complaint and as the contract that was signed shows, that the unions must each for themselves accept sign the contract or must sign their own contracts and did sign their own contracts, with the exception of three of those unions, in my opinion, maybe four. So they are not the real parties in interest. The Building and Construction Trades Council of the City of Reno, they are not signatories and had nothing to do with the contract entered into by, let us say, the plumbers with their employers.

Now let us go just a little further, and I doubt whether this is material because after all we are in here on what? We are not in here on the merits of this case; we are in here on whether or not this court will continue this restraining order and that dates back to whether or not the jurisdiction was there at the time of issue and whether jurisdiction extends if continued, but I did think this should be stated to your Honor because it is common sense. Counsel says that he would be satisfied if we just say whether or not these apply or come under the Taft-Hartley Act. Now let me point out something, what this injunction has done. Nobody is complaining about it, everybody is going along, working [87] just the same, and your Honor please understand me when I say that these matters are presented to

the court, not with the feeling that anybody is going to be injured—let me assure your Honor that this has not in any way injured the unions and they do not feel it has, because they have gone along under the restraining order, but they do not want to be restrained and it is a dangerous procedure to restrain, because they are always subject to one hot-head in a group of men which might be embarrassing to everybody else, on his own initiative and not on the initiative of the union, and do not misunderstand my statement that we are not going to contest to the limit the question of this restraining order. But now let us get down to this fact. Here is every union practically in this vicinity. Among them you will have, let us say, the teamsters. Now no one is going to contend that the teamsters, where they are working back and forth across the State lines, a lot of them, are not in a great many cases hauling interstate, not intra-state. Now that is one type of union. Now let us take another type of union here, and mind you, they are all tied up in this thing. We will take the laborers and hod carriers. All right. Here is a truck goes out here and gets a job to dig a ditch on a farm. If it is only a little ditch, he digs that ditch out there on that farm and the farmer is not under the Taft-Hartley Act, but that makes no difference, this restraining order ties up that [88] man just the same. Now every one is excluded who is in the agricultural business under the Taft-Hartley Act, everybody will admit that, but this injunction and prayer they are making, and what they are asking the order to say is that the man running the big Diesel across

the State line to San Francisco in the teamsters union, that he be put in the same condition with the man who is digging the ditch on the farmer's ranch out here where the union is exempt. Let us say it is a small ditch and they only had a few of the laborers out there, but the man had the contract and they are union men and dug the ditch, so the farmer said, "Now, I would like to have the ditch enlarged," so then they go and get the engineers, because they want bigger equipment, so he goes and gets a shovel and tractor and gets an engineer who is a union man also, and takes him out on the farm, and he goes out and works for that farmer and he is exempt from the Taft-Hartley Act. I am giving actual things that happen every day on these farmers' ranches. They say, "Well, we would like to have it boarded up or cemented." Now you are asked and you have, this court has, in its restraining order, restrained each and every and all of those people and counsel now comes in and says to us, "Tell us whether or not these are all under the Taft-Hartley Act" and no dead man or living ghost nor the highest court in the land can tell us that question, answer that question. Some may be and some may not be. It [89] takes two things to make interstate commerce. One is the type of work that is done by the contractor. For instance, let us take the carpenters, and they are working for Bill Smith today and Bill Smith gets a contract to go down there to construct a, say depot, for the Greyhound Bus Lines. He enters into a contract with the union. I would say that probably the carpenters at that particular time would be in, because they are

in interstate commerce activity. They work there for a little period of time. After that gets through, the contractor then gets a job to build a two-story house or three-story house. At the same time he is building this one over here, this job, he has another job over here where he is building a two or three-story house for a farmer on his farm and it is done under the same contract but on a different job. Now they are asking this court, which clearly this court can not answer, to say that all of these various unions, with their various activities, which takes in labor activities in this entire community, to say in one fell swoop, to say on every job they are performing, whether it be upon a farm, whether it be upon something clearly intra-state, to have this court say to every man on every job and every contractor on every job and to every farmer and to every business person in the State of Nevada, that every man who is a union man is under the Taft-Hartley Act and under interstate commerce. Now that is the purport of this [90] injunction as it has been issued.

Now let us see what declaratory judgment is supposed to be. I am just going to state this very briefly to your Honor. I will hand your Honor copies. What is the purpose of declaratory judgment? In many cases it has been held this, that the declaratory judgment act, Title 28, Section 400, is not jurisdictional, but procedural only, and it merely grants authority to courts to use a new remedy in cases without which they have jurisdiction. In other words, the jurisdictional facts must be present before the court has the right to use the

declaratory judgment. It just gives a new remedy for a court to act where there is a legal right or jurisdictional right and the court then can use this alternative, if it is called upon to do so. It just gives a new procedural method but it does not give any additional jurisdiction to the courts because the court's jurisdiction has been limited, and is limited, by various statutes.

Now the cases are cited, a number of cases I will have in this memorandum, which I will hand to your Honor. Now they ask you to come in and be their legal advisor. That is what this court is asked to do, tell them whether or not the Taft-Hartley Act applies, enter declaratory judgment. This is a case I have cited (reads from memorandum): And these are all very recent cases. I think they should be discussed just a second here. [91]

In this complaint the gear that they have expressed is upon information and belief. Now I want your Honor to bear in mind that, because I am going to come to that question as to the jurisdiction of this court to grant a restraining order where it is upon information and belief and not upon actual facts stated. The cases are quite numerous and legion on that. (Reads from memorandum, Louisiana case, 39 Federal Supplement, 567.)

Now if there is no controversy here you can't give then a declaratory judgment. If there isn't a labor dispute, there is no controversy. Where is the controversy? I want to reiterate that: (Reads: "In order to come within * * *.") Now that is the Caterpillar Tractor Company vs. International Harvester Company, 106 Fed. (2), 769.

I could go on and read you a number of cases, but I will hand to your Honor the memorandum from which I have been citing them. Now I want to leave this in the Court's mind and I want to hand to your Honor the latest United Supreme Court case upon this subject, and it came out—and we tried to get it out of your library but couldn't—it is the case of Bakery Sales Drivers Union vs. Wagshall, and it will be found in Vol. 92, No. 12, and the decision came down—it was decided on March 15, 1948, by the Supreme Court of the United States.

The Court: That is in the Law Edition?

Mr. Griswold: Law Edition advance opinions. But I [92] will hand this to your Honor during the noon hour if you want to look at it. It was the only one we could get in Reno.

Now, your Honor put your finger right square on the head of the cocoanut when you said, how are we going to overlook the Norris-LaGuardia Act? We can't. Council very carefully cited Section 103 or Section 105. He jumped then to 113. Now standing in the middle between those two—and in order to have a declaratory judgment he has to have some kind of a controversy, and the controversy we have here is between the labor unions and what is supposed to be the employers, if it is anything—so we must conclude that this injunction was issued against the labor unions and the only way you can issue it against the labor unions is to have a labor dispute. If there is no labor dispute here, then I say no court has a right to issue injunctions against labor unions who are involved, to keep them

working, as this does, and to hold the status quo insofar as this complaint asks for under temporary injunction, which we will discuss.

The Norris-LaGuardia Act, with reference to the issuance of injunctions, Section 107, sets forth: (Reads). Now that "actual knowledge thereof" is along the line of authorities that you do not issue temporary restraining orders upon information and belief, that there must be something besides information and belief to get it.

The Court: I think we will take our recess now, Mr. [93] Griswold.

Mr. Griswold: May I hand you this case, which has to do with this question, that is, is the Norris-LaGuardia Act changed by the National Labor Relations Act, the so-called Taft-Hartley Act, insofar as permitting individuals to get injunctions.

(Noon recess.)

Afternoon Session—1:30 p.m.

The Court: The court will come to order.

Mr. Griswold: May I proceed, may it please the Court, upon the assumption that your Honor has read the bakery case I handed to your Honor, the United States Supreme Court case.

The Court: I have not had a chance to read it yet.

Mr. Griswold: I asked that question because we want to shorten this as much as possible and not weary the Court, but that bakery case, you will note, was an injunction brought by a bakery and it was in the District of Columbia and they went over into Virginia, so those two states were involved

and so on—all those facts are rather unimportant, but if you will go over to subdivision (1) of the case, where the Norris-LaGuardia Act was—I think I marked it on there, if I may step to the bench I will point out the particular point I think is squarely in point—starting from there down to here—in that Supreme Court case. It is squarely on the point that we are now [94] making. Your Honor mentioned this morning in the Lewis case that was argued by counsel, that the United States government was involved, which is determinative on the argument of that Lewis case. In this case from the United States Supreme Court, and it was decided, as you will note, at a very recent date—is not in the books yet, March of this year—an individual was there asking that an injunction issue, the same as they are doing here. Now the Norris-LaGuardia Act that I started to read to your Honor came into question then on the issuance of injunctions, as compared with the Taft-Hartley Act, and whether or not the Taft-Hartley Act gave injunctive relief to individuals or whether or not it remained only in the hands of the National Labor Relations Board. Now you will find in the Taft-Hartley Act where the National Labor Relations Board have been given, by specific paragraphs, the right to get injunctions. Now they did not have that right as the National Labor Relations Board under the Norris-LaGuardia Act prior to the time of the passage of the Taft-Hartley Act, which put in Section 10 in the little pamphlet I have, which would be Section 160 in the United States Code. They put in the injunctive provision in favor of the National

Labor Relations Board. Now this case holds that the Norris-LaGuardia Act is clearly in force and effect and the Supreme Court of our country said, in that paragraph I pointed out to your Honor, that that did not change the Norris-LaGuardia Act permitting the issuance of injunctions to [95] private parties. The wording is so clear. It is only the National Labor Relations Board, not private parties, and there can be no question, the Supreme Court has spoken, in regard to that, and that paragraph that I have pointed out to your Honor that is marked is very short and it is very clear and it is entirely in point in this case. Incidentally, in that case, they refer to a number of other Supreme Court decisions and other decisions which I will not weary your Honor with, because they are all cited in that, in the event your Honor desires to read it. They uphold entirely the statement which was made in there and which I am stating from that act, and if you want to get the full picture and get the complete picture, you will note that the case, as determined in the Circuit Court of Appeals and from the report of that case from the Circuit Court of Appeals discusses at length the facts, plus the theory that we are now discussing with reference to the injunctive relief, and the Supreme Court upheld the Circuit Court in that respect.

I want to call your Honor's attention just to this, in that Section 107 that I was starting to read just before noon. You will recall that I made the statement that actual knowledge of the threats and the

committing of unlawful acts must be had by the parties that were to be restrained, and so on. In other words, information and belief is not enough, something that is not substantial: "That substantial and irreparable injury to complainant's property will follow." [96]

They say now that the only thing they want the Court to do is to say whether or not all these trades and unions and crafts are under the Taft-Hartley Act. They say now that there is no controversy, labor dispute. They say now that there has been no unfair labor practices, so far as the unions are concerned, committed. But still they are asking to have an injunction and then a restraining order. In order to have such, substantial and irreparable injury must result and "(c) That as to each item of relief granted, greater injury will be inflicted by the denial of relief than will be inflicted upon defendants by granting of relief; (c) That complainant has no adequate remedy at law," and I think they make that allegation as the conclusion in their complaint, but that is the only one I can see in the complaint so far under Section 107.

Now it is rather significant and important, I think—the Court will recall that the heading of this paragraph I am reading from says: "Temporary or Permanent Injunction." Now let us get on down to this temporary injunction, which is in the paragraph on page 63 from the section I am reading from: (Reads): "Such hearing shall be held * * *." Now none of that was done. "Such a temporary restraining order shall be effective * * *" and this was for a period of 7 or 10 days, I have

forgotten: “* * * and shall become void at the expiration * * *.” In other words, at this time, under that section, the restraining order is void, and so on; but may I assure this court, on behalf of [97] the people I represent, we make no point of that, save and except that it came up in reading of this particular section of the statute, and whether it is in or is not in is of no importance to us at this time, because we want to have a determination out of this court, feeling that your Honor has the matter fully in hand and will give the law to us, so I don’t urge that with the intent of saying that we can claim that we are not going to comply with anything that your Honor said until you say differently. (Reads): “No temporary restraining order shall issue * * *,” which has been done, and the rest of it is not in point.

Now let us set down to the section with reference to the prevention of unfair labor practices and the power of the Board. Now we are getting into the power of the Board, and that is the National Labor Relations Board, and that is Title 29, Section 160 and is found on page 285 of the United States Code Annotated. I am not going to go further in that than to say this, that injunctive relief, and the reduction of the testimony to writing and so on is within the power and discretion of the National Labor Relations Board. In other words, if we were faced in here by the National Labor Relations Board, asking that an injunction be granted under the Taft-Hartley Act, we would then be clearly under the provision of Section 160 of the Taft-

Hartley Act, which is found in the supplement to the same volume, and it comes on page 27 of the supplement, and [98] is section 160. Now, mind you, this is a new section. It is something brand new. That is not in the Norris-LaGuardia Act, it is not in the Wagner Act, it is not in the Anti-Sherman Act, it is not in any of the acts up until the passage of the Taft-Hartley Act, where it was put in. That gives the Board injunctive power that under certain conditions, but Section 10 of the act, which is this section that we have here, has a number of subdivisions. It goes clear over to (1)—a, b, c, etc. Those sections, by the very heading of the section, "Powers of the Board Generally," "Prevention of Unfair Labor Practices"—"Powers of the Board Generally," you will note that the very first word, "The Board" had the right to do these particular things. It is significant and your Honor will find that this is true in reading of the Taft-Hartley Act, that every place in the Taft-Hartley Act where an injunction is permitted, it is specifically stated in connection with that particular power and that particular paragraph.

Now let us go down and see what other change was made in the Taft-Hartley Act, insofar as employer and employee is concerned, because that is in the Act also. Now I am referring to Section 301 as it was set out in the act, which is Section 185 and found on page 47 of the same volume that your Honor has there. Now it is sub-chapter 4: "Liabilities of and Restriction on Labor and Management." This is new. Now that gives the right, for the first time since the Norris-LaGuardia Act [99]

was in force and effect for a suit for what? A suit for damages, but you will note, if it please the Court, that the suit is merely for a violation of a contract for damages and that there has been left out of that sub-chapter any and all of the injunctive provisions that were inserted for the benefit of the Board. Now that is why, in the Supreme Court cases that I just referred to, that were passing upon the Taft-Hartley Act on this last sub-chapter 4, to determine whether or not, under sub-chapter 4 on suits that were filed under that sub-chapter, whether or not the injunctive relief that was denied under the Norris-LaGuardia Act were repealed or changed, whichever way you look at it, or whether or not the Norris-LaGuardia Act is in full force and effect, irrespective of this sub-chapter 4, and a ruling of the Supreme Court is that these private parties—now this is not referring to the Board, this is referring to the private parties—that the Norris-LaGuardia Act is not changed, insofar as personal transactions between the unions and the employer. In other words, the Taft-Hartley Act does not give to private parties—that is what these gentlemen are—the right of injunctive relief. It still remains under the old Norris-LaGuardia Act, and the Supreme Court has spoken on that and I think it has set at rest for all time a rather difficult question, up to the case I cited at this time of March. [100]

I have here a comparatively recent case that touches upon the question that your Honor very properly asked at the beginning, with doubt in

your mind as to whether or not the courts have the right to step in on these matters, or whether or not the administrative rights must be exhausted before the National Labor Relations Board. In other words, is this something that should be before the Board, or is it something that should come into this court and by-pass the National Labor Relations Board. Now your Honor asked this morning, and correctly so, as one of the points that is of a great importance in this jurisdiction question. That matter has been discussed and the Taft-Hartley Act did not change the powers and duties of the Board. As a matter of fact, the Taft-Hartley Act increased the membership of the Board. The Taft-Hartley Act gave the members of the Board broader powers than they ever had before and the Taft-Hartley Act did not, in any way, in any provision limit, insofar as the suits and jurisdiction was concerned, the Board. The matter has been passed upon by the Supreme Court of the United States in several cases, the Meyers case and one other that is cited here, but just a short time ago there was a case decided, and it is very short, and with your Honor's permission I will read it, out of the Sixth Circuit Court of Appeals, and it is the case of Union Brick and Clay Workers of America vs. Junction City Clay Company, and it is found in 158 Federal Reporter, 2nd Series, at page commencing [101] at page 552. The facts were that there was a controversy that had existed between these clay workers and between their employer, the Junction City Clay Company and the Logan Clay Products. The regional direc-

tor of the National Labor Relations Board came in and they got involved in it. They did not seem to be getting anywhere before the National Labor Relations Board, so they by-passed the National Labor Relations Board and the individual, the appellee—incidentally, Louis A. Penfield was one of the fellows in that, I just happened to catch his name as the first one, I see him sitting here. The case was dismissed and an appeal was taken. The appellee had prayed for an injunction, ordering appellants to cease from further acts in furtherance of the conspiracy, and a decree ordering appellants, the Junction City Clay Company and the Logan Clay Products Company, to cease and desist from refusing to bargain with appellee, and for treble damages and attorney's fees. That was brought by the union. Now let us see what the court said:

(Reads: "We think the order * * *") Citing the National Labor Relations Board Act. (Continues reading.)

Mr. Brown: Is that an action for declaratory judgment?

Mr. Griswold: No, this is an action for injunction. Now it doesn't make a great deal of difference to me whether you take an action for damage and take a restraining order on me. Counsel overlooks this fact, we are in here on order to show cause. We have been restrained and retained and I don't care [102] whether we are enjoined by a red-head, a black-head or a blonde, you are still enjoined and if you can't, you can't, and if you can, you can, and as I read in the cases,

declaratory judgment is only a procedural act and is not a jurisdictional one, and those cases have already been cited. Now we are enjoined and if you can't by-pass the Board, the National Labor Relations Board, you can't by-pass them. I don't care whether you are going to try to do it with declaratory judgment and suit for damages, or a plain, ordinary old injunction suit. They either have jurisdiction or they haven't. If they have jurisdiction, they have what this court says, exclusive jurisdiction, and that is the ruling of the United States Supreme Court in the Meyers vs. Bethlehem case, which is cited under the first section I gave you. That is the holding in the Supreme Court case of the Newport News Shipping * * * vs. * * *, which is cited under the sections I have read here to you. Those cases uphold exactly what the Circuit Court of Appeals said. If any one can point out to me in the Taft-Hartley Act, or in any other act that has been passed since the Norris-LaGuardia Act, where there is any provision in that, either directly or indirectly, changing the injunctive provisions, except in one respect that I have mentioned, that is an injunctive relief that can be had by the Board, they read it more closely than do I, and I have read to your Honor and pointed out to your Honor sub-section 4, that shows what [103] can be done between individuals under the Taft-Hartley Act and that is all there is in it and that is merely suit for damages, without anything being said about injunctive relief. I do not care what counsel says about coming in under declaratory judgment act. What difference

does it make whether we are in here under declaratory judgment act or under damage action. We are in here at this hearing for one purpose and one purpose only. Our time to plead to the other actions has not expired. It does not expire for 20 days. We are in here in compliance, and gladly so, with your Honor's order to appear at this time and place and show cause, if any we have, why this restraining order that we have on us now should not be made pendente lite and then afterwards ripen into a permanent injunction, and that is all we are trying here now. We will meet the other issues when those issues are presented. We are discussing only the jurisdiction of this court to grant this restraining order and to keep it in force and effect.

I want to call just briefly—I do not want to take any more time because Mr. McCarthy is much more capable and versed and knows the law and the facts equally well with me, and the law a lot better, and I want him to have his time without wearying this Court, but I want to call your Honor's attention to this, and I would like to have your Honor turn to that restraining order that is in here. I won't have to read the fore part of it, but I do think I should call to your Honor's [104] attention this, starting with the "Now, Therefore," on page 2. Let us see what this has done: (Reads: "Now, Therefore, * * * 18th day of May, 1948." Now, your Honor, we can't write a letter and keep it in effect. We are restrained from keeping in effect a letter we have written. I don't know whether they really meant what they said there,

I can't believe they did, because in that letter you find at the conclusion of it this statement—and I have always understood this is what they wanted, I do not know, maybe not, I thought I did until I got over here today—and that is this offer on the last page of the letter of May 18th, which is exhibit attached to the complaint, we find this:

“You may be assured that the Reno Building Trades Council will be more than willing to further negotiate or consider any counter proposals which your organization may wish to offer.”

Now under their restraining order we are restrained from carrying that into force and effect. We can not negotiate with them, we can not come and see them, we can not talk with them, we can not do anything under that restraining order. This is our letter of May 18th to them, asking them to submit a counter proposal to us and let us negotiate further in this matter. Now what kind of business is that? We ask them to negotiate, we want still to negotiate, but we can't [105] even appear and start in to talk to them on any proposal or anything else that may come up under this restraining order, to come to any kind of understanding or agreement, and it would be, technically at least—I wouldn't hesitate to say, well, let's sit down and talk it over—but technically we would be in violation of your Honor's restraining order in doing so, because they tell us we can't keep in effect that letter, can't keep in effect that paragraph, we can't negotiate, we can't do anything to get the matter

straightened out among the various crafts and various unions who are signatories to contracts, and only three of them signatory to the contract that is attached to the complaint. I do not think counsel intended anything like that. He couldn't have.

Now let us go on: (Reads from order—" * * * and from issuing or otherwise * * * during the pendency of this action." Well, although the powers of courts are broad, the court has no right to write contracts for people. In other words—I know your Honor has this in mind clearly, but just to be on the safe side and so counsel will understand the position—the unions and the men—first let us get down to basic things—the men who are down underneath the unions, they are asking for wages and hours and working conditions. Now this Court nor the Supreme Court of the United States nor any other court can write a contract for them and say, "This is going to be your contract." You can say, you have to live up to a contract, [106] but courts do not turn themselves into the mediators or writers of contracts between various parties. Now they say to us in this that we are restrained from finally saying that the contract is void or will be terminated; then they must want to keep the contract in force and effect. Now in their letter, in reply to this letter here, they say that they are not going to violate the law; so what have they done? If the contract is in violation of the Taft-Hartley Act, or any other act, they have called upon this court, and have gotten a restraining order that has kept in force

and effect the illegal provisions of that contract. If that contract is in violation of law, they have continued that violation by their restraining order, for a period of ten days at least, and now they are asking to keep it into full force and effect during the trial of this action, and then to make it permanent.

Mr. Brown: No, we are not asking for permanent injunction.

Mr. Griswold: Well, you want it then while the case is on and it will take a long time. It makes no difference whether you violate the law one or five or twenty days, you are in violation if the contract is in violation of law, you keep it in violation by this restraining order. I could go on and discuss a lot of these points, but as I say, I want to let my associate in this matter, who represents one of the [107] unions, finish and cover other points, and I thank your Honor for being so courteous to me.

Mr. McCarthy: May it please the Court, one of the nice things about being a lawyer is sometimes when you lose cases you find out later on you were very lucky. It so happens that quite a few years ago while my associate, W. H. Metzger, a long-time member of this Bar, was alive, we engaged in some litigation, finally ended up before the Ninth Circuit and Judge Denman, who was senior judge at that time, was kind enough to dispense entirely with the rules and gave us what amounted to an entire day for argument, being a case of first impression. I think Judge Denman's decision in that case is determinative of this one.

In that particular case I took the position Mr. Brown and petitioners take. It was an action for declaratory relief. It was an action in which we requested an injunction restraining the teamsters from interfering with our relations with the employers, an action in which we asked the court to direct and order the employers to bargain with the brewery workers. It will be found in 106 Federal Reporter (2), at page 871. In that case we argued that since the contending union and the employer admitted jointly, and without reservation, that the brewery workers was the choice of 100 percent of the employees, that it wasn't necessary that we go before the Board. We argued also that because at that time the Board was refusing to hear any case [108] where the unions involved were both members of the American Federation of Labor, as these unions were, they felt it was an internal family squabble and should be settled by the parent organization, and the Board refused absolutely to exercise its discretion, we said, first, everybody admits we have the right; the Board won't hear us because it won't exercise its jurisdiction. What did the Circuit Court say? They said this: (Reads: "The National Labor Relations Act provides whenever * * *") In other words, the Board, having the power, it was up to the board to decide whether it was going to use it or not, so that even though, in that case, the Board wouldn't act, they held that we couldn't have it. They said this: (Reads: "Since both the employees and the brewery workers union * * *".)

The Court: What volume is the case from?

Mr. McCarthy: 303 U. S. 41. This case says it was not the power of the employer, if I recall correctly, to enjoin the Board from proceeding with certain hearings. They held that of course the district court did not have it. Now they said further: (Reads: "The decree declaring the brewery workers union to be the bargaining agent of the brewery delivery men and ordering the brewers to deal with that union is reversed and the complaint and cross-complaint other than the teamsters ordered dismissed as to their claim for declaratory relief.") In other words, we had obtained from Judge [109] James in the district court an order directing the employers to bargain with us. They reversed that order specifically.

With respect to the injunctive powers of the court, the court said: (Reads: "The district court held that the demand on the brewers * * *") Insofar as they are unlawful, the court then proceeded to set out provisions in the Norris-LaGuardia Act that must be complied with. That decision came down in 1939 and there we had asked and obtained an injunction directing and requiring the employer to bargain with the union. We had asked and obtained a ruling that we were under the act, that we were the qualified bargaining representatives and the employer must deal with us. The Circuit Court said as long as Congress set up an administrative tribunal to answer those questions, they can not be answered either by this court or the district court, and reversed and sent it back in its entirety, with the suggestion that we may have had a case

under the Sherman Act by way of violation of the anti-trust act, but that we did not have any for declaratory relief.

Now I would like to ask the Court to bear with me just a few minutes while we go through this complaint from the standpoint of the operating engineers Local Union No. 3. Local No. 3 covers the territory of northern California and northern Nevada and the entire State of Utah. Local No. 3 has around 15 to 16 thousand members. Better than 95 percent of all heavy construction is operated by the members of that [110] union in this area. Local No. 3 writes agreements. We have just completed one with the Associated General Contractors covering all of the northern part of the State of California and it was signed just before I left San Francisco to come here. Local No. 3 is named here as a respondent or defendant and yet you can search this record from beginning to end and you can't find where Local No. 3 has anything to do with this case at all, and it is only one of a number of unions in the same position.

We go to the exhibits attached to the complaint. I don't think that counsel will question my statement of the law to the effect that when you make an allegation in a complaint and then attach an exhibit, the exhibit controls the allegation, if it is a writing; so he alleges that he has an agreement with these defendants and then he attaches a copy of the agreement. We assume, of course, it is a complete copy. We must, in fact, for the purposes

of this motion to dismiss here, assume the truth of everything pleaded, the same as under a demurrer or anything else. So this agreement recites that it is made by and between Reno Employers Council for and on behalf of the General Contractors, Sub-contractors, who have signified their approval thereof by the attached authorization attached hereto, and hereinafter referred to as the Employer. In other words, the plaintiff in this action is an agent. No where in this complaint does the plaintiff plead [111] it is an agency coupled with the case. This Reno Employers Council does not employ any operating engineers, does not employ any plumbers, laborers, or anybody else. It pleads itself here that it is an agent, authorized to negotiate an agreement for certain people who authorize it to. It says: “* * * the Building and Construction Trades Council of Reno, Nevada, and vicinity, and its various affiliates * * *”. Well, now, Local No. 3 is an affiliate of Building Trades Council—of various counties in northern Nevada, “* * * who accept for themselves and for the various crafts councils and for their various local Unions, which have jurisdiction over the work in the territory hereinabove described, hereinafter referred to as the Union.” They they come along with this paragraph:

“Each local Union authorizing the acceptance of this agreement does so by attaching a stipulation to that effect, signed by its duly elected officers, which will be attached hereto, and becomes a part hereof.”

So what is the situation of the Building Trades Council? It, when this agreement was negotiated, wasn't even an agent. It wasn't acting for and on behalf of its membership. It sat down with this Employers Council. It said, "Look, we will draw up an agreement, one that the Council likes, then we will take that agreement to our local unions and if they want it they can accept it, sign it, and it becomes their agreement [112] and that is the exact language that is in the agreement: "Each local Union authorizing the acceptance of this agreement does so by attaching a stipulation to that effect, * * *".

Now notice it recites that the Reno Employers Council had been authorized to enter into this agreement at the time it was negotiated:

"This Agreement made and entered into by and between the Reno Employers Council for and on behalf of the General Contractors, Sub-contractors, who have signified their approval thereof by the attached authorization attached hereto, * * *"

And later on, when you get into the agreement, you find that it recites—in the complaint rather, it recites in the complaint—on page 5:

"That each of said members did then and there, and prior to the execution of said contract, authorize the Reno Employers Council as its bargaining agent to enter into said contract for and on behalf of the members thereof."

That wasn't the situation with respect to the unions who subsequently adopted this contract and made it themselves. So we have this situation—and I think we have to analyze these matters as lawyers and not just merely advocates—we have here a contract. The plaintiff says, "This is my contract." The contract says it is not your contract. The contract pleaded [113] by this plaintiff says that this plaintiff was an agent who made an agreement for a group of contractors and that it is their individual agreement, the contractors. Now if I go out and sell an automobile for the XYS Sales Agency, say I sell it to Mr. Smith, and Mr. Smith does not pay for that car, the salesman doesn't bring the action to collect the money. The Sales Agency, the corporation that sold the car, sues for the money, because it is the real party in interest. There is no pleading here that this Employers Council holds a general power of attorney, with authority to sue, and even if it did, this is not an assignable action, the same thing they are bringing here. So we have a situation here where an agent, who negotiated an agreement, comes into this court and asks that the acts be declared thereunder. For example, I am an attorney. I negotiate a contract with another attorney. I say, this contract is approved for form. I take it to my client. I say, "John, I think it is a good deal, you had better sign it." It is a satisfactory legal contract and John signs it. Then a dispute arises under that contract. Do I sue the other attorney to find out what the contract means, or

do our respective clients sue each other? And yet the position of the California Employers Council in this case is no different than attorney and client, the position of the Reno Building and Construction Trades Council is no different than that of attorney and client. It acted as agent throughout [114] this entire agreement. It is clear that they were acting as agent. It is clear that the Employers Council had authority when it sat down to negotiate. The Reno Building and Construction for this agreement had no authority when it sat down to negotiate. All it said was, "We will take this to the local unions and when they approve it, it is their agreement," and that is what was done, because if you will turn to the back of the agreement, you will find the stipulation of the hod carriers and common laborers:

"We the duly authorized officers of the Hod Carriers, Building and Common Laborers Local Union Number 169, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Reno Employers Council."

Then they went on to say:

"It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the General Building Contractors of Reno and Local 169."

Now if you go back again to the agreement, let us see how they sign it: [115]

“In Witness Whereof, the parties hereto have hereunto set their hands and seals by their respective officers thereunto duly authorized this 21st day of May, 1947.

CONTRACTORS LISTING,
ROY B. FLIPPIN,

Representing General and/or Independent
Contractors”

Now when a corporation signs, the officer affixes the seal of the corporation and their signature, the corporate name, by virtue of resolution passed by the board of directors authorizing and directing it. This is not a corporate signature. This plaintiff is the corporation and so pleads itself. It did not even go under its fictitious name, the Reno Council.

Now lawsuits are serious matters. They are expensive. The men who make up these unions are the people who foot these bills, and yet we are brought into court on an agreement that we are not a party to, that it appears on its face we are not a party to, that this plaintiff is not a party to, and we are, at the same time, restrained in our operations. Whether your Honor's order would extend to the three states in which we operate, is something we paid no attention to, because we intend to obey it any way. We have no quarrel with obeying the order. That does not say that we

concede, for one moment, that on this complaint this court has jurisdiction to make it.

Now what was the signature of the Reno Building [116] Trades Council:

“Harry A. Depaoli,
Pres. Nev. State Fed. of Labor. Representing
Reno Bldg. Trades Council and vicinity”

But the Reno Building Trades did not agree in this agreement to do anything. It does not agree to it and is not in it.

Now this agreement covers a lot of territory. When they say “what we want your Honor to do is to say whether we are under the act or we are not”, they are not being very fair to the court or fair to counsel. The National Labor Relations Board was asked the question, “Is building and construction under this act?” and the Board said, “Gentlemen, we have now been made a judicial power of the United States governmentfi quasi-judicial. It is our duty to decide cases as they arise upon the facts, the same as the courts of the United States have for years, and all other competent law courts, and we can not tell you, blanket, whether this industry is under it or not. We can only decide specific cases involving specific facts as they come before us and out of our numerous decisions eventually will arise a rule of law,” which is the case with everything. That is the common law system of operating. It is true under Roman law they operate in a different fashion.

Now here is the problem. I made up a list for Mr. Denham’s office of various contracts written

for Local 3, contracts covering different type of work, with different type of [117] employers. That list, your Honor, is one page long, not the names, just the types and kinds of work. Now this says here that this agreement shall cover all work within the jurisdiction of the unions signatory hereto, as recognized by the Building and Construction Trades Department of the American Federation of Labor. That is, it is negotiable. Well, I will say quite frankly to your Honor that we could take evidence in the case of any one of these unions four hours a day for four months and we would never complete the description of the work performed by that one union. Just take, for instance, how many types and kinds of jobs is a pick used on, or a shovel, or a hammer, or a saw. Yet, your Honor, every one of those jobs must be described under the form of this complaint. The employers must also be searched, because it is the employers' contract that, to a certain extent, determines the coverage. That is why the Board was set up in the first place. When you come before the Board, you come in on a question of unit, and this is something that apparently has not been given any particular thought. You say it is not an unfair labor practice to refuse to bargain if the unit desiring that you bargain is wrong, and yet under this act the Board, and the Board alone, is authorized to determine what is or what is not an appropriate unit. In other words, this is the situation—to refuse to bargain collectively with an employer, providing he is the representative of his employees, subject [118] to the provisions of

sub-section (a). Now, "The board representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining with respect to the rights of plaintiff." Then we come down here: "The Board shall decide in each case whether, in order to insure employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

Now these people are in here saying, "You are going to bargain with this Council and the unit." What is it? It is neither a craft unit nor an employer unit. Some of these men are engaged in material supply work, some of them do on-the-job cite construction. I say quite frankly to your Honor, in our opinion, they do not constitute an appropriate unit under this act, for the purposes of collective bargaining. Now that is a decision which must be made by the Board and until the Board decides that this plaintiff constitutes an appropriate unit, for the purposes of bargaining, the union has no duty to bargain with it. It isn't a question whether this industry is under the act or not. If this law applies to these parties, the only thing that has to be done is for the plaintiff to go down to the 20th Region, call on Mr. Penfield, and [119] say, "I would like to file an unfair labor practice charge against the Reno Council for refus-

ing to bargain." One of the first questions Mr. Penfield would ask is, "What is your unit?" Well, here perhaps the appropriate unit is our membership. When that case comes on for hearing, we would have the right to litigate the appropriateness of that unit. We could go in there and argue that the unit was inappropriate. If the Board agreed with us, we would be under no necessity to bargain with these people whatsoever. Now this court may not take over those powers which have been granted to the Board itself.

The situation, your Honor, has come up a number of times here in representative cases, where the question is who represented the employees and who did not. That is what the District Court said in 38 Fed. Supp., 321, at page 322: (Reads: "If this court were to inject * * *") Now then substitute the word "unit" and you have the situation as it exists here. The Board alone is empowered with the authority to determine the appropriate unit. The act imposes a duty on unions to bargain with the employer in good faith in an appropriate union. If it is not an appropriate unit, there is no duty to bargain, and yet they are asking this court to make that decision for the Board.

Getting back once again to the agreement. You can not find any approval of this contract by Local No. 3. Local [120] 3 of the operating engineers—we are now assuming the complaint to be true—it does not appear on the face of it ever executed this contract or authorized anybody to execute it for them. The exhibit shows that two unions of

numerous union defendants signed it. Local No. 3 did not.

In addition I would like to direct your Honor's attention to the allegations made here on information and belief. On page 9:

“That your petitioner is informed and believes and therefor alleges the fact to be that respondents * * *.”

Now that includes Local No. 3:

“* * * will not negotiate or bargain upon any other assumption than that they are not covered by the provisions of the Labor Management Relations Act of 1947 and that they have determined that they will not comply with the provisions of Section 8 A 3 of said Act; that your petitioner is informed and believes and therefore alleges the fact to be that the position of respondents whereby they have contended throughout their negotiations that they are not covered by said Labor Management Relations Act of 1947 * * *.”

Aside from the fact that it is a complete misstatement of fact, that isn't the point now, we think if your Honor would take a [121] look at C.J.S. 43, Section 195, page 902, you will find the rule stated thusly: (Reads.) Citing cases, some of them federal.

Now when we come down to this other section I find myself in great difficulty. Counsel says there is no unfair labor practices being committed around here and yet it is a complaint that alleges on

information and belief there is. He says there is no labor dispute, and yet it is a complaint here that says it is. They say this on page 11:

“That any interruption of the status quo of the parties hereto will interfere with the free flow of interstate commerce by reason of the interruption of the buying, selling, transportation of lumber, paints and other materials, and labor between the States of California, Nevada and others by reason of slow-downs, strikes and other forms of coercion which your petitioners are informed and believe and therefore avers to be the fact that said respondents will employ immediately upon the termination of the master agreement and other contracts in the event that petitioners do not meet the demands of respondents contained in their letter of May 18th, 1948; * * *.”

Now I think, just as the respondent, operating engineers, in objecting to the court's jurisdiction, is bound by the allegations of this pleading, I think the petitioner is bound by [122] them also. The statement of counsel to the effect that the facts are that as alleged in his pleadings, can not be sufficient at this stage of the game to save the pleadings. In “Labor Disputes and Collective Bargaining”, by Ludwig Teller, Vol. 1, we find the following—Mr. Teller is one of the leading authorities today on labor law: (Reads: “The following labor activities have been held * * *.”) In each instance he cites the applicable case. There isn't any doubt at all that these acts which are here charged are acts

which constitute a labor dispute under the terms of the Norris-LaGuardia Act, and there is incidentally no compliance with the procedure provisions of this act. There is in addition to that no allegation or thought that the police force of the State of Nevada and the City of Reno is insufficient to control the violations supposed to be occurring, in order to get an injunction under that act. In addition to that they say this:

“* * * that unless the temporary restraining order herein prayed for is granted by this Court, the issue will become moot and the contractual relationship between petitioners and respondents cease before this Court has had time to consider and determine the jurisdiction of this Court to entertain this cause between these parties.”

So that this record may be clear, I would like to make a formal objection at this time that the petition in this [123] case is defective and that it asks this court and seeks relief directly contrary to the 5th and 14th amendments of the Constitution of the United States. It flies directly in the face of due process and it wipes out any protection that the government has placed around the sanctity of contracts. If this contract, by its terms, expires on a certain day, that is the agreement of the parties and I say most respectfully that no court has the power to change that termination date. If there has been some mistake, these people may bring an action for reformation of the instrument, and if they are entitled to it, the instrument will be

reformed by the court, but by reforming the instrument, the court does not write a new contract for the parties. It simply decides judicially what the contract always was. This court has been asked and what is said here is, that the expiration date of this agreement be arbitrarily, by this court, changed and the contract extended without the consent of one of the parties to the agreement. The National Labor Relations Act, the Norris-LaGuardia Act, and declaratory relief act, there is no act that gives to the District Court of the United States that power. As a matter of fact, we submit that an exercise of any such power is directly in conflict with the 5th and 14th amendments, and I say so seriously and want to make it absolutely plain, where Local 3 is concerned we are raising that constitutional question at this time, the first hearing on this matter, so [124] that we may, if necessary continue to pursue it.

I direct your Honor's attention to two recent decisions—I have not the citations on them because they are in the advance sheets—one is in the District Court in northern California, International Longshoremen and Warehousemen Union against —, a decision in 21 N.L.R.R.M. at 2635. Here is what it says, reading from the syllabus: (Reads.) In other words, the union here came in and said, "This employer won't deal with us. He won't bargain with us." That is what these gentlemen are saying.

Mr. Brown: No, we don't.

Mr. McCarthy: Except on its own terms, which is the same thing. I mean, a qualified refusal is a

refusal. If you attach what is claimed to be a qualifying condition to your act, it is a refusal just the same; otherwise it is words. This union comes in and wants the court to order the employer to bargain and incidentally that is what is being sought here. We are being ordered to continue our agreement, we are being ordered not to do various things.

Now what did the court have to say, going to the text of the opinion? They said here: (Reads: "Prior to its amendment the National Labor * * *.") In so deciding, of course, the court is only following the long line of decisions, some of which have already been called to your Honor's attention.

There is one other point I think we should direct your [125] Honor's attention to and I would like to direct your Honor's attention to the case of Alabama State Federation of Labor against McAdory, found in 325 U. S., 450, 89 L. E., 1725. I think there was quite some considerable difference of facts; however, the legal principal is the thing we are interested in. Of course, they do arise from the facts. It seems that we have in the State of Nevada an act passed in 1917, No. 10,473, which makes, or purports to make, it "unlawful to enter into any agreement, either orally or in writing, by the terms of which an employee of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization or shall promise or agree to become or continue a member

of a labor organization." That is a State statute. Now whether that State statute is applicable to this case or not may not be, by this Court decided in a declaratory relief action of this sort. (Continues reading from Alabama State Federation of Labor case "Petitioners say there is no * * *.") Yet, your Honor, if this State statute is applicable to this contract this plaintiff has presented to your Honor with an illegal agreement, which this plaintiff is asking your Honor to declare his rights under, so that before we can even get down to declaring any rights of duties under this agreement, one of the problems [126] that would have to be met is, did the law of the State of Nevada at the time this agreement was entered into make the entering into that agreement an illegal act? Was it a violation of the State law? But your Honor can't pass on that in a declaratory relief action, because the Supreme Court said the State of Nevada must first construe that statute, and yet they have construed the statute in order to consider the contract. So I think your Honor must take judicial notice that that statute, as far as it was in full force and on the date signed and one of the things involved, is legislation, especially in a labor union.

Mr. Brown: In interstate commerce.

Mr. McCarthy: Not necessarily so, no, because the N.L.R.B. provides in the act itself in those cases where a State has more restrictive legislation than the N.L.R.B., then that restrictive legislation is adopted by the Federal Government as its legis-

lation. So much so, and Mr. Penfield will bear me out, that the Board has elected that if elections be held in the State of Nevada by reason of existence of that statute, a determination is made, because that statute is made controlling by the National Labor Relations Act.

Mr. Griswold: Personally I question whether or not that is one of the issues we have before us at this time.

The Court: Well the only issue the Court is interested in at this time is whether or not this restraining order should be continued. As far as [127] the merits of this matter is concerned, it is not before the Court. It is merely on Mr. Brown's motion to continue the order.

Mr. McCarthy: We respectfully submit that the Court is without jurisdiction to continue the order, and particularly where Local 3 is concerned, it is apparent from the face of complaint, that we are not even parties in this action, as are a lot of other unions. We respectfully submit that the order should be quashed, vacated and set aside.

(Short recess.)

Mr. Griswold: Just this, if the Court please, I stated I would have for your Honor this list of authorities and to hand opposing counsel, and at this time may the record show that I do so. This covers points which I discussed. In order that the points that have been raised by both Mr. McCarthy and myself may be set forth, at least partly, I at this time ask the Court to file our formal written motion to dismiss, upon the grounds and for the rea-

sons that we have heretofore set forth, and may the record further show——

The Court: Motion to dismiss the action?

Mr. Griswold: No, dismiss the restraining order, on the points we have argued and those points only.

Mr. McCarthy: May we at this time have the record show that Local 3 joins in that motion.

Mr. Griswold: And may the record show that the other [128] defendants join in the motion, which I do not believe is covered in the motion that was filed to dismiss the restraining order, that was made by Mr. McCarthy, so that we are together on the various points.

The Court: So understood.

Mr. Penfield: May it please the Court, I would like to state at this time, so far as general counsel is concerned, in respect to this issue of the Court's jurisdiction to grant injunction for relief, I am in accord in substance with what counsel for the defendants have said in that regard. It is our position that the Board's jurisdiction is exclusive, insofar as injunctive relief is concerned, under the Taft-Hartley Act. I am not concerned with any other aspects of the case at this time.

Mr. Haugh: May it please the Court, the statement made by Mr. Penfield has emphasized the difficulty, I think, that is confronting us here today, in that we have heard and have had expounded some very excellent law upon factual situations and cases that have no application to the matter now before your Honor. Now whether or not the Board has exclusive jurisdiction, is necessarily dependent upon

whether or not the Act applies to the operations of the parties in this hearing, and that is the question before you. They are pre-supposing that your Honor is going to decide this case in our favor, apparently, by making the arguments that have been made, and [129] in these cases where injunctions have been denied, you will note that each of them involved a labor dispute within the meaning of the Norris-LaGuardia Act, or they were cases in which the parties were seeking relief through the stopping of unfair labor practices, or other matters under and by virtue of the rights granted in the Labor Management Relations Act, and it is our position that until your Honor has decided this case, those cases are not in point. Now it is entirely possible that in the future we may become involved in a labor dispute and then we must conduct ourselves in accordance with the statutes and the law that has been presented to you here today, but until that labor dispute exists, they do not apply.

Now we take the position, if the Court please, that we are attempting in this action to have your Honor determine the application of this law before we have a labor dispute, before the things that were concerned in these other cases happened to us. We do not want a labor dispute to occur. That is the reason we are here. We want your judgment and your understanding of whether or not this law applies to our operations and the relationships between these parties, so that, if possible, we may avoid a future labor dispute that could arise under its application or non-application. We want to

know, so that we can guide ourselves accordingly and prevent the labor dispute about which they [130] complain in their arguments.

That same thing is true under the Nevada law. It may be that we will have to have a lawsuit to find out what the Nevada law means, but that is tomorrow or the next day or some place down the road. It may be that we will have to have a lawsuit with the National Labor Relations Board to find out whether they can say that in those cases that have laws similar to the statutes of Nevada, they will not hold elections, but that is another case and it is further on down the road, if at all.

My reaction to what has occurred here today in the arguments presented is that we have vaulted completely over the issue before you and you have assumed that we are involved in cases wherein these parties are seeking to assert some right under this act. We are not doing that. We want to know whether or not it does apply. Then, if it does, we can assert those rights in the proper way. If it doesn't apply, where is the application of the Norris-LaGuardia act, where is the exclusive jurisdiction of the Board? There isn't any. They have jumped clear over the true issue before you.

Now we have heard a great deal about the Norris-LaGuardia Act, and I think it would be well to give some consideration to it. First of all, we do not think there is a labor dispute, we do not think this is a type of case wherein the Norris-LaGuardia Act applies in any way, because [131] we are asking your Honor to tell us simply whether or not

a federal statute applies to the operations as set forth in this petition. That is all.

Mr. Griswold: May I ask through the Court a question of counsel?

The Court: Yes.

Mr. Griswold: Why have we got a restraining order injunction then? Why are we in here at this time discussing it? Why slap us down with that kind of procedure?

Mr. Haugh: I will be glad to answer counsel. I have been wanting to do that ever since he first made that remark I call attention to the last page of the contract attached to the petition as Exhibit "A":

"This agreement shall remain in effect for a period from May 24, 1947 to and including May 21, 1948 and shall continue to remain in full force and effect thereafter, except as to wages and hours, which may be subject to change or modification by a thirty (30) day notice being served in writing by either party upon the other party for a desired change in this Agreement."

That is the termination clause in this contract.

Now I understand there have been negotiations, it is so alleged in the complaint and these parties are in the process of negotiations, or have been and the question has arisen [132] between them as to whether or not the Taft-Hartley Act applies to their operations and their relationships. There is even a difference of opinion among the unions. Some say it does, some say it does not. The em-

ployer says we think it does and the National Labor Relations Board, through Mr. Denham, says "I don't know." That is the problem before your Honor, does it or doesn't it? That is all there is to it and there being no labor dispute, it being a simple request for declaratory judgment your Honor has the inherent right regardless of any law to maintain the status quo while you decide that question. That is what the Lewis case says, and I think it is sound law. I think it is good. I think you should have the right and by the way, I don't see why these respondents are complaining. They are continuing to operate as they have for the past year, they are still working, they haven't been hurt according to counsel representing them, there isn't any damage being done to them, these poor ditch diggers and teamsters driving the trucks—I don't mean teamsters. They are one union that agrees with us. But they have not been hurt in any way because the contractual rights contained in that instrument are continuing. Because of things that have happened during these negotiations, we have alleged that it was expected that there would develop trouble and we asked your Honor to issue his order, staying the proposition, maintaining it as it is until this question is answered that is before [133] you, whether or not the law applies. I will tell you why we did it this way. We were hoping thereby to avoid a labor dispute, to get this troublesome question answered by a competent authority before we became embroiled in a strike, to determine whether or not we can force somebody to ac-

cept it, do it legally or otherwise. Now that is our position. As I say, I think it is fundamental within the right of this court, to protect the status quo under this contract. We are not seeking to enforce it. We are not seeking to change its terms. We are not asking for relief under the Labor Management Relations Act. We are not charging any unfair labor practices. We may later in some other proceeding, either before the Board or before some court, but that is not the charge here. We are not asking that now. All we want your Honor to do is to tell us whether or not this law applies to our operations, and during the time it takes you to give it consideration, you maintain the existing relationship between us by issuance of the temporary injunction.

Mr. Brown: Your Honor, this morning I neglected to give you the United States citation of this Columbia River Packers case. It is cited in Vol. 315, U. S. Reports and it commences at page 143.

Now if the Court would bear with me just one moment. This is an action decided in 1942, which I think suggests that there are distinctions where the jurisdiction of this [134] court, even in certain cases which on their face may appear to be, at first blush, labor disputes and they said the Norris-LaGuardia Act does not prohibit injunctive power, and if the Court will bear with me just one moment—this is rather interesting. Mr. Justice Black wrote the opinion of the court: (Reads—315 U.S.—
 “* * * The jurisdictional requirements of the

Act.''). And I might say what those are under the Norris-LaGuardia Act. They are those specific findings of fact enumerated in Section 107, which Mr. Griswold has so ably brought to the Court's attention. In other words, the Norris-LaGuardia Act, Section 107 Title 29, even in labor disputes it does not prevent the Court from hearing testimony, going ahead after proper findings of fact, that certain things exist under 107(a), (b), (d) and (e), but in this case Justice Black says: (Reads: "The jurisdictional requirements * * * to issue the injunction sought.'). Now then it is pointed out that: (Reads: "Respondents * * *').

Now I appreciate the fact, may it please the Court, in anticipating the question of counsel that is it not a true fact that the facts in the case at bar are entirely different than those in this case. Certainly they are, in this respect. Our people are not independent contractors, but may I respectfully suggest to your Honor the point that we make by this case is this—that it is not the only case in which employers and their employees are parties to an action in a federal court that gives rise to [135] the application of the Norris-LaGuardia Act, and I respectfully submit to your Honor, as Mr. Haugh has indicated, the only dispute in this case is this, does the federal act apply to this particular industry under the contract, Exhibit "A," or does it not. Now there is, we submit, no controversy there concerning the terms or conditions of employment or concerning the association of persons seeking to arrange terms or conditions of employment. We do

not contend that these people are not representatives of the union; we do not contend that they have refused to bargain; we have not contended that there is any dispute at all; and may I respectfully suggest that there is one thing that a very sound lawyer told me not long ago, in reference to a problem of research on the tax law. I had been reading a lot of decisions and every decision had different facts and every case had apparently different findings in the field of taxation and different wording, and he said, "The trouble is with you, Brown, if you desire to find the answer to a problem on income tax, go to the Internal Revenue Act. The act is a provision of Congress which prescribes the rights and liabilities of the people involved in controversy." Following that, what seems to me to be a pretty sound bit of research, may I invite the Court's attention to Title 29 the Norris-LaGuardia Act, Section 113(c) because the Norris-LaGuardia Act says this, that under certain circumstances an injunction can be made and entered by the federal district court, [136] even in labor disputed, provided certain findings of fact are made, and then it says initially that the district court may not have jurisdiction to issue these restraining orders and preliminary injunctions in cases growing out of or involving labor disputes as defined in Sections 101 to 115; so, therefore, it would seem to me, may it please the Court, that the language of Section 113(c) of the Norris-LaGuardia Act, which is found on page 83 of Title 29, numbered 1 to 200 that there is the key, whether or not

your Honor has a right to proceed at this time to take testimony on the question of the preliminary injunction pendente lite. This statute says "the term labor dispute includes any controversy." Now we contend the matter before your Honor is a controversy. We contend it is an actual controversy, which is subject to be resolved under the declaratory statute, but these peculiar kind of controversies which limit the jurisdiction of your Honor concern the conditions of employment or concern the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. This is the particular question before your Honor—Query: Does, by reason of the interstate allegations of our complaint, bring our people within the terms and boundaries of the Taft-Hartley Act? Is it one of those disputes which concern the terms or conditions of employment? [137] It does not, because if the act applies, may it please the Court, Congress has prescribed the terms and conditions of employment in this industry. If it does not, under the facts, the commerce facts, as alleged and sought to be proven, if under those facts the Taft-Hartley bill does not apply, then the conditions of employment or the terms of employment will be determined by statute later or after negotiation and bargaining between the respective parties.

Does the controversy concern the association or representation of persons in negotiating, fixing,

maintaining, changing or seeking to arrange the terms or conditions of employment? We respectfully suggest, your Honor, it does not. If this Court finds, upon a hearing of the merits of this case, ultimately that the Taft-Hartley bill applies to the operation in all phases of this particular industry, by reason of it being engaged in interstate commerce as defined by Congress and federal statute and by Section 41(8), Title 28 then it simply means that any further controversy concerning terms or conditions of employment, concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, will proceed as provided by an application of the Taft-Hartley bill and when and if, upon the happening of those conditions prescribed in the Taft-Hartley bill certain controversies arise which require petitions to the National Labor [138] Relations Board, or other procedure or complaints, then, and then only, will the controversy resolve itself down into one concerning the terms or conditions of employment. Now if that be true, may it please the Court, we are simply asking your Honor this: we are asking you whether, by reason of the facts, resolving this thing into an interstate commerce operation, the Taft-Hartley bill applies. Now that is the only controversy—does a certain federal act apply?

The Court: Does a federal act apply to each of the multitude of labor unions?

Mr. Brown: No, your Honor, our query is, does it apply to this industry, which we allege in our

complaint has operated under a contract for at least one year, that is in the complaint, where all of them agree to the same conditions under that contract, except small modifications that may affect some particular craft. Traditionally, historically, and right on the 21st day when this complaint was filed, there was in effect a contract which was predicated upon the appliance of the old National Labor Relations Act. The employers recognized the various respective unions as the properly certified bargaining units and agents and representatives. They rest upon the agreement. Now these people hope to bargain for either an extension of this present Exhibit "A," a different one, or a refusal of it or a refusal under a modified proposition and they are simply stymied because some of [139] the folks in the Trades Council, which is the bargaining agent, as far as the master agreement is concerned, for virtually all of these unions, they say in their letter of May 18th, "Gentlemen, we feel that we can take the position that the Taft-Hartley Act does not apply." The employers come over here and they say, "Now, gentlemen, there is no controversy concerning terms or conditions of employment, but we feel that the Taft-Hartley Act does apply and if it does apply, we must, when we do sit down to the table to negotiate and bargain with you concerning any dispute, we have got to do it according to those rules." Now we contend this, if our people, as a collective group, constituting an industry, is found by this court to be engaged in interstate commerce, so as to fall under the provisions of the Taft-Hart-

ley bill, then I say the court has passed on the merits of the major issue before this court, but if the court simply assumes, from the allegations of this petition at the present time that the Norris-LaGuardia and Clayton Act applies, because we are in interstate commerce, then by the same token certainly the Taft-Hartley bill likewise applies.

We take this position—we take the position, first, that under 113(c), this does not constitute a labor dispute, hence there are no restrictions placed by the Norris-LaGuardia Act on the jurisdiction of this court; secondly, assuming that it is a labor dispute, still we have not only the burden, [140] but we have the right, to proceed at this time to present our testimony, so that your Honor can determine whether the court, from the evidence, is justified in finding the prerequisites under Section 107, for the issuance of a preliminary injunction from this date on under the Norris-LaGuardia Act, but more fundamentally and more essentially, your Honor, let us realize the position, outside of the motions which were filed and served. We are in a position where simply perhaps from the allegations of our petition, which contain some allegations of interstate commerce, we are assuming that your Honor must infer and conclude, as a fact and as proven on behalf of the respondents, first, that interstate commerce does exist in the operation of this industry, because if it did not, no federal act would be applicable, the Taft-Hartley Act, the Clayton Act nor the Norris-LaGuardia Act. Secondly, it is assuming that there is a labor dispute which the

court must find as a matter of fact from what? The argument of counsel. They have not presented any facts. They are assuming certain things what your Honor has got to find, and going back to this Lewis case, the court said in the Lewis case essentially this, that the court had a right to maintain the status quo until it had an opportunity to hear argument and receive the presentation of facts to determine even if there was a labor dispute within the definition of the Norris-LaGuardia Act. And we contend for those reasons, may it please the Court, that [141] that the court is in no better position of being enlightened at this very moment than you were at the time the ex parte application was presented.

Upon those grounds and for those reasons we respectfully suggest that the Norris-LaGuardia Act does not preclude the court proceeding with the hearing of testimony.

In respect to this declaratory judgment, the Louisiana case which I suggested to your Honor this morning by the Supreme Court of the United States, is the Etna Life Insurance Company vs. Haworth, 300 U. S. Reports, and commences at page 227. Now this particular case, according to the article of the Bar Association, is the first case under the declaratory judgment act, Title 28, Section 400, of 1934 which really, by the decision of the Supreme Court, as to their uses, places any life or light into the declaratory judgment statute. Since that time the courts have held this, they have held this thing is purely a procedure remedy, as Mr.

Griswold suggested. It does not confer jurisdiction where jurisdiction does not exist. We do not have to show an irreparable injury, we do not have to show the absence of any other remedy, adequate or inadequate, in law or in equity, to invoke this particular business. Now counsel contends that that wasn't an actual controversy. He contends further that we are merely asking this court for an advisory opinion. Now we appreciate the fact that unless the controversy is actual, unless there [142] was advisory purpose and unless it was ripe for decision, then, of course, we have no right to ask this court, or any other court, for an advisory opinion.

In this particular case there had been a failure to pay premiums on life insurance and it involved the maintenance of reserves of some 20 thousand dollars. There was a provision in the life insurance policy which says when the policy holder became disabled that then further premiums would be waived. As long as the disabled policy holder would live, his rights with the Etna people would be preserved. Now under the insurance laws it became essential for the Etna Life Insurance Company to maintain reserves against those policies, although the company, in full faith, believed that the man's permanent disability was not actual and in accordance with the provisions of the policy. Now they had the choice, the Etna Life Insurance Company could have set up their reserves for a period of five, ten, twenty or thirty years, as long as Mr. Haworth would live, and then when he died they could deny liability, and then in addition to that, they would have faced a suit of the widow to determine whether

or not they were liable. They did not choose to do that. They said, "Here is an actual controversy. We are not asking for judgment, we are simply asking the federal court to determine, under the declaratory judgment act, whether or not there is any liability," so then, of course, that matter came up to [143] the Supreme Court and the opinion was written by Chief Justice Hughes and in the opinion the Court said: (Reads: "The complaint asked for a decree * * *".) Then he points out on page 240: (Reads: "The word 'actual' * * *".) Dropping down to the last paragraph: (Reads.)

As a matter of fact, one federal court has held just that very thing. That point was raised in the case of *Adams vs. N. Y. C. & St. L. R. R. Co.*, Circuit Court of Appeals, Indiana, 1941, 121 Fed. (2), 808. There railroad employees could maintain an action for declaratory judgment defining their seniority rights, regardless of remedy available to the employees before the administrative tribunal, as provided by section 151, etc. The point, therefore, is this. We can not bargain. This thing is going to result in irreparable injury. There is no labor dispute, and unless this court assumes jurisdiction and retains the status quo until he can define whether the federal act applies or not, then, of course, there will arise injury and the whole purpose of your declaratory judgment statute as a remedy will be defeated. Formerly, before 1934, the Supreme Court of the United States said neither in equity nor in law these courts can not give a judgment of any kind unless a wrong or

breach had occurred. The very fact that Congress provided a statute, a remedy, was to prevent the arising of a labor dispute over whether or not this book of rules applies, or this, and we are prepared, at [144] the Court's convenience and ruling to proceed with our factual burden.

The Court: I am ready at this time to rule on the question of the motion you made this morning, Mr. Brown.

At the beginning of the session this morning, Mr. Brown, on behalf of the petitioner, moved the Court for a preliminary injunction to preserve the status quo and that is a matter that we have discussed and considered throughout the day. Now, on the 21st of May the Court made its order to show cause and issued temporary restraining order. The order to show cause required that the respondents appear before the Court and show cause why preliminary injunction, to the same effect as the restraining order, should not be issued, on the 28th day of May, 1948, at 10:00 o'clock. At the time the application was made for the temporary restraining order, the Court's attention was called to the case of United Mine Workers of America, 330 U. S., 258 and in the course of its opinion the Supreme Court of the United States in that case stated:

“In the case before us the district court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief.”

In that case the defendants determined the law for themselves and did not heed the injunction of the district [145] court or the restraining order of the district court and violated it and they were held in contempt.

Now I feel that this is the same situation we have here. If this order that was made May 21st had been violated by any of the persons to whom it was directed, I wouldn't hesitate to act. I wouldn't hesitate to punish for contempt any person or persons or organization who violated that restraining order, under authority of the United States vs. United Mine Workers, on the theory that this court, and any other court, has a right to hold matters in status quo until the Court has opportunity to decide the questions involved, questions of law, and that was the purpose I had in issuing the preliminary order, temporary restraining order, in this case.

Now we have had an opportunity to hear from counsel on questions of law concerning the issuance of temporary restraining order or preliminary injunction. I can't understand how it could be said there is no labor dispute involved here. I think counsel has stated that the purpose of this is to prevent labor dispute from arising, or series of labor disputes from arising, so then we are, of course, interested, involved here, in consideration of labor disputes, not existing now, but contemplated in the future. Before the so-called Taft-Hartley law was enacted, and which is merely an amendment of the National Labor Relations law, the

[146] National Labor Relations law was in general the same kind and class of legislation as the Taft-Hartley law, and when complaints were made before the National Labor Relations Board, the employers complained of frequently questioned the jurisdiction of the National Labor Relations Board. Many cases are shown in the annotation to the different sections, having to do with the law before the enactment of the Taft-Hartley law, that the defendants or respondents, as they might have been called raised the question of the jurisdiction of the National Labor Relations Board, claiming that they were not involved in interstate commerce or their activities did not affect interstate commerce. One of those cases is the National Labor Relations Board vs. Van de Camp Packers in the Ninth Circuit, 152 Federal Reporter, Second Series. This is in the circuit court of the Ninth Circuit. The Board petitions for the enforcement of its order. The company contends first that the National Labor Relations act is not applicable, since it is not engaged in interstate commerce. It was decided there that that particular case was without merit.

Now suppose some controversy does arise here. What is there to prevent the petitioner from filing a complaint with the National Labor Relations Board, complaining about some alleged unfair labor practice of one of these unions, or of a group of these unions? Then the union or unions involved [147] could raise before the National Labor Relations Board the question of whether or not it was involved in interstate commerce, or whether its act-

ivities affected interstate commerce. Then the National Labor Relations Board could determine whether or not it had jurisdiction of the case and the party dissatisfied could take the matter to the Circuit Court of Appeals.

Cases of jurisdiction of the National Labor Relations Board have, I think, in the past always been cases first to the Board and then afterwards carried into the courts. I feel that whatever restrictions placed upon the courts by the Norris-LaGuardia bill still exist, unless we can find that they have been lifted by the present act, the Taft-Hartley Act, so we have to look to that Act to see what the power of this court is in regard to the issuance of restraining orders and the exercise of the injunctive power of the court.

This action is brought under the declaratory judgment statute. Now if the court couldn't, under the same set of facts as appeared in this complaint, issue an injunction in an action for damages, or an action for any other kind of relief, it couldn't issue an injunction in a declaratory judgment action. Petitioner may or may not be entitled to maintain an action to determine whether or not any or all of these labor organizations are subject to the Taft-Hartley Act. Whether such an action can be maintained is not [148] now before the court. The only question before the Court is whether or not this preliminary restraining order should be continued or whether a temporary restraining order or preliminary injunction should be issued pendente lite, and that is the only point I am attempting to decide.

Here is the holding of this court: That this court is without power to continue the present restraining order in effect and it is without power to issue, as prayed for, restraining order or preliminary injunction pendente lite, without prejudice at all to any other proceeding in this case, and that is the order of the court. [149]

State of Nevada, County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled, *California Association of Employers vs. Building and Construction Trades Council of Reno, Nevada, etc.*, No. 700, at the hearing on Order to Show Cause, held at Carson City, Nevada, on the 28th day of May, 1948, and that the foregoing pages numbered 1 to 99 inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, June 2, 1948.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed June 2, 1948. [150]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendants above named, with the exception of Defendant Local Union of Operating Engineers, No. 3, all represented by their counsel, Morley Griswold and George L. Vargas, Esqs., and appearing especially for the purpose of this Motion to Dismiss, and move the Court as follows, to wit:

I.

To dismiss the complaint filed herein upon the grounds that the said complaint fails to state a cause of action upon which relief can be granted.

II.

To vacate and dismiss the complaint filed herein upon the ground that the Court lacked jurisdiction in that the complaint [151] fails to state a cause of action against said defendants, or any of them, upon which relief can be granted.

III.

To vacate, or in lieu thereof, quash the summons on the ground that the Court lacked jurisdiction.

IV.

To dismiss the complaint and quash the summons on the ground that the Court lacked jurisdiction of the subject matter of the action by reason of the Norris-LaGuardia Anti-Injunction Act, 47 Stats. 70, 29 U. S. C. A., Secs. 101-115.

V.

To quash the summons and dismiss the complaint upon the ground that the Court lacked jurisdiction to grant the relief sought by reason of the Norris-LaGuardia Anti-Injunction Act above stated.

VI.

To quash the summons and dismiss the complaint upon the ground that the Court lacks jurisdiction in that the subject matter is solely within the jurisdiction of the National Labor Relations Board, Labor Management Relations Act of 1947, 61 Stats. 136, 29 U.S.C.A. 141 et seq.

VII.

To vacate, or in lieu thereof, quash the summons and dismiss the complaint upon the ground that the relief prayed for is contrary to and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

VIII.

To vacate and dismiss the complaint filed herein upon the ground that it appears on the face of the complaint that the plaintiffs are not proper parties plaintiff in the said action and have no capacity to sue. [152]

IX.

To vacate and dismiss the complaint filed herein upon the ground that the defendants are not proper parties defendant in the said action.

X.

To quash the summons and dismiss the complaint upon the ground that the subject matter and relief prayed for are not within the provisions of the

Declaratory Relief Act, March 3, 1911, c. 231, Section 274 d. as added June 14, 1934, c. 512, 48 Stats. 955 as amended August 30, 1935, c. 829, section 405, 49 Stats. 1027, 28 U.S.C.A. 400.

/s/ MORLEY GRISWOLD,

/s/ GEORGE L. VARGAS,

Attorneys for above named
Defendants.

Service of the foregoing Motion to Dismiss, by delivery of a copy thereof, is hereby admitted this 4th day of June, 1948.

BROWN & WELLS,
Attorneys for Plaintiff.

[Endorsed]: Filed June 7, 1948. [153]

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant, Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, appearing specially, moves the Court as follows:

1. To vacate or in lieu thereof quash the summons and dismiss the Complaint upon the ground that the Court lacked jurisdiction in that the Complaint fails to state a claim against said defendant upon which relief can be granted.

2. To vacate or in lieu thereof to quash the Summons and dismiss the Complaint upon the ground

that the Court lacks jurisdiction in that the subject matter is solely within the jurisdiction of the National Labor Relations Board, Labor Management Relations Act of 1947, June 23, 1947, c. 120 61 Stats. 136, 29 U. S. C. A. 141 et seq. [154]

3. To vacate or in lieu thereof quash the Summons and dismiss the Complaint upon the ground that the relief prayed for is contrary to and in violation of the 5th and 14th Amendments to the Constitution of the United States.

4. To vacate or in lieu thereof quash the Summons and dismiss the Complaint upon the ground that the subject matter and relief prayed for is not within the provisions of the Declaratory Relief Act. March 3, 1911 c. 231, Section 274 d. as added June 14, 1934, c. 512, 48 Stats. 955 as amended August 30, 1935, c. 829, Section 405, 49 Stats. 1027, 28 U. S. C. A. 400.

5. To vacate or in lieu thereof quash the Summons and dismiss the Complaint on the ground that the Court lacked jurisdiction of the subject matter of the action by reason of the Norris-LaGuardia Anti-Injunction Act, Act of March 23, 1932, c. 90, 47 Stats. 70, 29 U. S. C. A., Secs. 101-115.

6. To vacate or in lieu thereof quash the Summons and dismiss the Complaint upon the ground that the Court lacked jurisdiction to grant the relief sought by reason of the Norris-LaGuardia

Anti-Injunction Act, Act of March 23, 1932, 192, c. 90, 47 Stats. 70, 29 U. S. C. A., Secs. 101-115.

Dated: May 31, 1948.

/s/ P. H. McCARTHY, JR.,
Attorney for Defendant, Operating Engineers Local
No. 3 of the International Union of Operating
Engineers.

Service of the foregoing Motion to Dismiss, by
delivery of a copy thereof, is hereby admitted this
4th day of June, 1948.

BROWN & WELLS.

[Endorsed]: Filed June 7, 1948. [155]

[Title of District Court and Cause.]

MOTION OF THE NATIONAL LABOR
RELATIONS BOARD AND LEAVE
TO INTERVENE

Comes now the National Labor Relations Board
and, under Rule 24 of the Rules of Civil Procedure
for the District Courts of the United States, moves
for leave to intervene in the above styled cause in
order to protect its interest in the existing con-
troversy.

1. The plaintiff herein relies for ground of re-
lief upon certain provisions of the National La-
bor Relations Act, as amended (61 Stat. 136, 29
U.S.C.A., Supp. 1947, Secs. 141, et seq.), which
Act is administered by the National Labor Rela-

tions Board, an agency of the United States of America. The gravamen of plaintiff's complaint is that the collective bargaining agreement between plaintiff and defendants is subject to the provisions of the amended National Labor Relations Act, and that defendants are engaged in, or threaten to engage in, certain conduct which constitutes unfair labor practices under Section 8 (b) (2) and (3) of that Act. Plaintiff therefore requests that this Court should temporarily enjoin the commission of such alleged unfair labor practices, and should issue a declaratory judgment as to whether the contract between the parties is subject to the amended National Labor Relations Act. [156]

2. It is of vital importance to the National Labor Relations Board that its interest be adequately represented, and that the issues raised herein be properly determined. It is the Board's position that, under the amended National Labor Relations Act, the Board is vested with exclusive initial jurisdiction to determine whether the operations of employers and labor organizations affect commerce within the meaning of that Act, and that federal district courts are without jurisdiction to determine such questions at the suit of private parties. It is also the position of the Board that exclusive primary jurisdiction to determine whether unfair labor practices within the meaning of the Act have been committed is vested in the Board, and that federal district courts are without jurisdiction, at the suit of private parties, to determine whether unfair labor practices have been committed and to remedy, by injunction or otherwise, unfair labor

practices. The jurisdiction of federal district courts over unfair labor practices has been expressly limited by Sections 10 (j) and 10 (l) of the amended National Labor Relations Act to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed.

Wherefore, the National Labor Relations Board respectfully prays that its motion to intervene be granted.

DAVID P. FINDLING,
Associate General Counsel;

A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations
Board.

Dated at Washington, D. C., this 30th day of June, 1948.

[Endorsed]: Filed July 2, 1948. [157]

[Title of District Court and Cause.]

MOTION

Comes Now the plaintiff and moves the Court for an order releasing, discharging and exonerating the cash bond heretofore deposited upon the issuance of Temporary Restraining Order in the above matter upon the following grounds:

I.

That said Temporary Restraining Order was dissolved by the above-entitled Court upon the hearing of the show cause order issued by this Court.

II.

That no damages upon which bond or undertaking was conditioned accrued to defendants or any of them.

BROWN & WELLS,
By /s/ ERNEST S. BROWN,
Attorneys for Plaintiff.

[Endorsed]: Filed July 6, 1948. [159]

[Title of District Court and Cause.]

ORDER

The motion of Petitioner to exonerate the bond in the sum of One Thousand Dollars (\$1,000.00), heretofore deposited with the Clerk of the Court upon the issuance of the Temporary Restraining Order, coming on for hearing after due and regular notice, and good cause appearing therefor.

It Is Hereby Ordered, Adjudged and Decreed that said bond is hereby exonerated and the Clerk is hereby ordered to [160] return the said sum of One Thousand Dollars (\$1,000.00) to counsel for Petitioner.

Dated: September 17, 1948.

/s/ ROGER T. FOLEY,
Judge.

Received from Amos B. Dicky, Clerk of the above-entitled Court, the sum of One Thousand Dollars (\$1,000.00), as payment in full of the sums deposited with him as a bond in the above-entitled matter, and as directed and ordered by the above-entitled Court.

Dated: This 17th day of September, 1948.

BROWN & WELLS,
By /s/ ROBERT W. WELLS.

[Endorsed]: Filed Sept. 17, 1948. [161]

[Title of District Court and Cause.]

CONSENT TO INTERVENTION

Now comes the Respondents, Building and Construction Trades Council of Reno, Nevada, and Vicinity, et al., being the respondents represented by the undersigned, Morley Griswold and George L. Vargas, Esqs., and consent and agree that the Motion of the National Labor Relations Board for Leave to Intervene be granted, and the undersigned consent to such intervention.

Dated: July 6, 1948.

MORLEY GRISWOLD,
GEORGE L. VARGAS,
Attorneys for Building and Construction Trades
Council of Reno, Nevada, and Vicinity, et al.

[Endorsed]: Filed July 8, 1948. [162]

[Title of District Court and Cause.]

CONSENT TO INTERVENTION

Now Comes the Petitioner, California Association of Employers, being the Petitioner represented by the undersigned, Brown and Wells, Esqs., and consent and agree that the Motion of the National Labor Relations Board for Leave to Intervene be granted, and the undersigned consent to such intervention.

Dated: July 13, 1948.

/s/ BROWN & WELLS,
Attorneys for Petitioner.

[Endorsed]: Filed July 16, 1948. [163]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated that Operating Engineers Local No. 3 of the International Union of Operating Engineers having appeared specially herein to contest the jurisdiction of the Court do hereby consent to the intervention of the National Labor Relations Board.

Dated this 2nd day of August, 1948.

/s/ P. H. McCARTHY, JR.,
Attorney for Operating Engineers Local No. 3 of
the International Union of Operating Engineers.

[Endorsed]: Filed Aug. 6, 1948. [164]

[Title of District Court and Cause.]

MOTION

Now Come the defendants above named, represented by [165] Morley Griswold and George L. Vargas, Esqs., and including all defendants save and except Operating Engineers Number 3, and appearing specially for the purpose of this motion to dismiss, and for no other purpose whatsoever, and do move the Court as follows:

I.

To dismiss the complaint filed herein upon the ground that the said action is now a moot question as shown by the affidavit attached hereto and made a part hereof.

II.

To vacate and dismiss the said complaint for the reason and upon the ground that no actual controversy exists between plaintiffs and defendant upon which the Court can give a declaratory judgment.

III.

To vacate and dismiss the said complaint for the reason and upon the ground that the complaint does not allege an actual controversy in compliance with Title 28, Section 400, U.S.C.A.

IV.

That defendants be permitted to present this motion at a time agreeable to Court and counsel.

Dated: September 2, 1948.

MORLEY GRISWOLD,
GEORGE L. VARGAS,
Attorneys for Respondents.

Service of the foregoing Motion, by delivery of a copy thereof, is hereby admitted this 4th day of September, 1948.

BROWN & WELLS,
Attorneys for Petitioner.

AFFIDAVIT

State of Nevada,
County of Washoe—ss.

Ernest M. Reynolds, being first duly sworn upon his oath, deposes and says:

That he is a citizen of the United States, that he is a resident of the County of Washoe, State of Nevada, that he is Secretary of the Building Trades Council of Reno in the City of Reno, State of Nevada, and that he has been such Secretary for more than two months; that as such Secretary he is familiar with any and all contracts and all of the operations, doings and proceedings of the respective Unions which comprise the said Building Trades Council; that at the date of the making of this [167] affidavit, that certain contract being Exhibit "A" attached to the complaint on file in the above-entitled action, has been and is of no

force and effect; that none of the said Unions, individually or as a group, are employed under or by virtue of the terms of said contract, and no members of any of said Unions are being paid or employed by reason and by virtue of said contract; that both employers and employees have cancelled said contract and that the said contract, by its own terms and by reason of notices given, has been cancelled or is terminated.

That new and different contracts have been entered into by each, every and all of the Unions in the above-entitled action and that the said new contracts are separate and distinct for each Union and said employers and employees are now operating under said new, separate and distinct contracts; that at the time of the making of this affidavit there is no labor dispute or trouble to your affiant's knowledge in the City of Reno between parties plaintiff and any of the parties defendant and covered by any of the provisions of the agreement Exhibit "A" attached to the complaint.

Dated: Reno, Nevada, September 3, 1948.

ERNEST M. REYNOLDS.

Subscribed and sworn to before me this 3rd day of September, 1948.

(Seal) MABEL ENGLISH,
Notary Public in and for the County of Washoe,
State of Nevada.

My Commission Expires: January 21, 1952.

[Endorsed]: Filed Sept. 4, 1948. [168]

[Title of District Court and Cause.]

COPY OF MINUTE ORDER OF
SEPTEMBER 16, 1948

* * * It Is Stipulated and Ordered that the Motion of National Labor Relations Board for leave to intervene be, and the same hereby is, granted. * * * [169]

[Title of District Court and Cause.]

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO DISMISS THE COMPLAINT.

The National Labor Relations Board moves this Honorable Court to dismiss plaintiff's Bill of Complaint herein, and as grounds therefor assigns the following reasons:

1. The gravamen of the Bill of Complaint is that the collective bargaining agreement between plaintiff and defendants is subject to the provisions of the National Labor Relations Act, as amended (61 Stat., 29 U.S.C.A., Supp. 1947, Secs. 141, et seq.), and that defendants are engaging in, or threaten to engage in, certain conduct which constitutes unfair labor practices under Section 8 (b) (2) and (3) of that Act. Plaintiff therefore requests that this Court should temporarily enjoin the commission of such alleged unfair labor practices, and should issue a declaratory judgment as to whether the contract between the parties is subject to the amended National Labor Relations Act.

2. This Court is without jurisdiction of the subject matter of the complaint because: [170]

(a) The amended National Labor Relations Act vests the National Labor Relations Board with exclusive initial jurisdiction of matters involving unfair labor practices.

(b) The federal district courts do not have jurisdiction, at the suit of private parties, to determine whether the operations of employers and labor organizations affect commerce within the meaning of the amended National Labor Relations Act, to determine whether unfair labor practices within the meaning of the Act have been committed, or to remedy, by injunction or otherwise, unfair labor practices. The jurisdiction of the federal district courts over unfair labor practices has been expressly limited by Sections 10 (j) and 10 (1) of the amended National Labor Relations Act to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed.

(c) Plaintiff has failed to exhaust its administrative remedy under the provisions of the amended National Labor Relations Act.

Respectfully submitted,

DAVID P. FINDLING,
Associate General Counsel;
A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations
Board.

Dated at Washington, D. C., this 30th day of June, 1948.

[Endorsed]: Filed Sept. 16, 1948. [171]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Hearing on Motion of National Labor Relations Board for Leave to Intervene and Motion to Dismiss.

Appearances: Brown & Wells, by Ernest S. Brown, Esq., Attorneys for Petitioner. Griswold & Vargas, By Morley Griswold, Esq., Attorneys for Building and Construction Trades Council of Reno. Louis S. Penfield, Esq., Appearing on behalf of joint counsel of National Labor Relations Board. P. H. McCarthy, Jr., Esq., Attorney for Operating Engineers Local No. 3 of International Union of Operating Engineers.

Be It Remembered, That the above-entitled matters came on for hearing regularly before the Court at Carson City, Nevada, on Thursday, the 16th of September, 1948. The following proceedings were had:

The Court: Case No. 700, the California Association of Employers vs. certain labor councils and unions, and there are several motions here and have counsel agreed on which one to consider first?

Mr. Griswold: We would bow to the wishes of the [175] Court. Two motions are determinative of the case. The very excellent brief that was filed by Mr. Penfield, who the Court will remember was in court last time representing the National Labor Relations Board, who was joined in it by Mr. McCarthy, who will be here in a moment, and joined in by my office. Then the other motion that was filed at a later date upon the ground that the case

is now moot and that was supported by an affidavit, with no counter-affidavit as yet having been filed, which I presume means that the statements in the affidavit are taken as correct, unless there is something here.

The Court: The clerk informs me there is a counter-affidavit.

Mr. Griswold: I said I had not been served with it. I have it now. Under the circumstances, with counsel from out of the State being here and perhaps their time being more crowded than mine, I am willing to step down for counsel, if they would desire to make their argument first, or I will argue the moot question and let them argue the other question, as they see fit. I believe the proper person to argue the question of jurisdiction would be the representative of the National Labor Relations Board because the government is interested and they are much more capable than any one else of presenting that question, so it is whatever your Honor and counsel decides, so far as my office is concerned.

The Court: It might be well before we launch into [176] any argument to have note made of the appearances.

Mr. Brown: For the record too, your Honor, there has been a motion to intervene, of course, on the part of the International Labor Relations Board, and we would like to have the record show that we stipulate that the Court may enter an order granting that motion to intervene, which will dispose of one of those matters at this time.

Mr. Griswold: I think we have all filed written consent to that matter.

The Court: So ordered then, the petition to intervene will be granted.

Mr. Penfield: Since the motion we filed went to the subject matter of the Court's jurisdiction over the subject matter, it might be well to consider that first. Since the motion to intervene was already granted, I will pass that up and go directly to our motion to dismiss. I think we have already filed this motion with this court, filed with a memorandum setting forth our reasons and authorities—motion of the National Labor Relations Board to dismiss the complaint.

The Court: I see; very well.

Mr. Brown: May I just make a suggestion that might save time, not by way of interruption. May it please the Court, if I may suggest to the court and counsel and for the purpose of expediting his motion, we, of course, now concede that insofar as any argument is concerned in regard to injunction and temporary restraining orders, that the way the record stands now, of course, we will have to concede that under the ruling of this Court and under further research that we have made, that any pleadings in the complaint relative to an unfair labor practice, which was the basic initially for our motion for declaratory injunction, is immaterial at this particular hearing. We concede all those arguments of counsel.

The Court: Let me ask you then, does it mean that all the allegations that are in the complaint

which may have to do with charges of unfair labor practices are now out of the case?

Mr. Brown: They are now out of the case and the only thing that we feel is material, in view of the Court's ruling and our own concessions, is whether or not there is a controversy here which is sufficient, under the requirements of Section 400, Title 28, to enable this Court to consider whether or not, under the declaratory judgment remedial provision, the Court has jurisdiction. Our complaint and our prayer limit only to asking for declaratory judgment on whether the Taft-Hartley act applies, or whether the matter is purely a State matter.

The Court: May I see if I clearly understand the situation as you have presented it. Your point is that the matter before the Court is to determine whether or not a declaratory judgment should be granted to the effect [178] that the labor unions named in the complaint as defendants are within the purview of the Taft-Hartley law?

Mr. Brown: Yes, your Honor.

The Court: And further that all allegations in the complaint which may tend to allege unfair labor practices on the part of all or any of the labor unions are out of consideration now?

Mr. Brown: Yes, your Honor. In other words, we take the position at this time that those allegations regarding irreparable injury, things which might happen and which were previously suggested to be unfair labor practices appearing in our complaint, were put in there for the purpose that our complaint was used as the basis for the prayer

for restraining order, temporary injunction, and what have you. We now consider that that matter is behind us.

Mr. Griswold: Under the record as it now stands, I now at this time move the Court for dismissal of this action upon the ground that counsel's statement has divested this Court of any jurisdiction that it may have had and that the Court has no jurisdiction at this time to hear any of this matter, for the reason and upon the ground that the Taft-Hartley Act and the law as it now stands puts within the administrative jurisdiction of the National Labor Relations Board the determination of the question that is now presented by counsel to this Court, and I won't argue that motion because [179] I think we have covered it.

The Court: In addition to the statement you have just made, would you be kind enough to summarize what you consider your view of the contentions of the complaint, on what they are based?

Mr. Griswold: Now he is coming in asking only that this Court determine this question: Are the unions and the employers under the Taft-Hartley Act or are they not? No question of damages, no question of restraining orders, no questions are presented save and except that one question, that they are asking your Honor to pass upon—are they under the Taft-Hartley Act or are they not. Now the act, in my opinion, and that was the purport of my motion, the act is so clear that the National Labor Relations Board—and the cases are so clear upon that point—as an administrative body determines that question and they have the sole juris-

diction of determining that question and no appeal can be taken or no court action can be had until an appeal is taken from the action of the National Labor Relations Board and they have claimed to have done something wrong. I think in a nutshell I have stated the position.

The Court: A ruling on your motion will be deferred for the time being.

Mr. Griswold: I expected that and wanted the record clear and I would like Mr. Penfield, who is very familiar with [180] that law to argue it.

Mr. Penfield: If I understand Mr. Brown's position at the present time, he is conceding that insofar as the allegations of his complaint might seek to have this Court decide——

The Court: Not to interrupt you, and after I get settled, I will not any more—how would it be now to ask Mr. Brown to state what he considers the basis of the controversy. In order to invoke the declaratory injunction law, there must be an actual substantial controversy. Let us get Mr. Brown's statement what the controversy is, so we will know what the contention is. You don't object?

Mr. Penfield: No.

Mr. Brown: May it please the Court, our position is this, that we contend, from the statement of the allegations in the complaint, that at the time of the filing of the complaint, on or about the 21st of May of this year, there were pending negotiations between the respondent unions and the petitioners in respect to the renewal of the collective bargaining contract. That is alleged in the complaint. Then it is further alleged in the complaint that at

that time and place two additional major demands were made in the negotiations by the unions. The first one, of course, was for a closed shop or other form of union security. The other one concerned wages and hours. Then it is alleged that during that negotiation the employers took the position that there [181] could be no negotiations or contracts relative to union security because the negotiations were governed by the federal Taft-Hartley Act. The complaint further shows, in the correspondence which is attached as exhibits, that at that time and place it was the contention of respondent unions that the Taft-Hartley or federal act did not govern the particular situation alleged in the complaint. Now we contend—of course, Governor Griswold has filed a motion that the matter has become moot and we assume that matter will be taken up after Mr. Penfield's discussion on this thing—but we contend the controversy is an actual substantial one, it is ripe for decision, it involves adverse interests at this particular time, and it consists succinctly of this, that here are your unions that have endeavored to have their rights determined in relation to their dealings with their employers, they contend that the Taft-Hartley does not apply to the formation of any contract between themselves and the employers. The employers, on the other hand, contend that the Taft-Hartley act does apply and governs their negotiations, and in view of that situation we are now limiting our prayer to merely seeking a declaratory judgment of this court that we are engaged in interstate commerce or the circumstances, as alleged in the

complaint, so affects interstate commerce as to be governed by the Taft-Hartley act. The other people, on the other hand, naturally, if the Court entertains jurisdiction to hear the matter on its [182] merits, might declare that the Taft-Hartley Act——

The Court (interrupting): Let me ask you right there, Mr. Brown—at the present time are there any negotiations pending?

Mr. Brown: There are, your Honor.

Mr. Penfield: Which ones?

Mr. Brown: The Electrical Workers have not signed an agreement. The Roofers, at this particular time, who are respondents, have a definite stipulation with employers which refers to this controversy and is merely a stipulation relative to wages and hours and it quotes in the contract the fact that until such time as this matter is determined by your Honor, the other conditions, such as union security, etc., will remain in abeyance, until such time as the Court makes its ruling.

Mr. Griswold: I would suggest, if the Court please, that that document be put before the Court. I did not get that interpretation.

The Court: Mr. Brown says negotiations are pending between the Electrical Workers.

Mr. Brown: There is now pending negotiations between Electrical Workers, respondents, and employers. There is merely a stipulation as to wages and hours and any other working conditions between employers and carpenters Local Union 971, carpenters and joiners, and for the sake of the record at [183] this time I should like to offer in evidence the stipulation between Reno Employers

Council and Roofers and Waterproofers Local, dated July 21, 1948.

Mr. McCarthy: Pardon me, gentlemen, before offers of proof are made, I think we should enter our appearance also. P. H. McCarthy, Jr., Local Union 3, special and associated jointly with Mr. Griswold. We did originally, if the Court please, move to vacate, quash and dismiss the proceedings, upon the ground that jurisdiction of the subject matter is solely within the National Labor Relations Board. What troubles me is this—counsel has stated that certain parts of his complaint are no longer applicable. I think in fairness to the Court and counsel we should be given the exact language of this complaint which that statement impliedly strikes, because it is pretty difficult to argue a complaint on the statement that certain allegations are no longer before the Court and counsel concedes they are no longer before the Court. I think we should know exactly what those allegations are, so we would know what complaint we are to argue on.

The Court: I think from Mr. Brown's indications, he is willing to do that.

Mr. Brown: Yes, your Honor.

The Court: And then we can follow along and see——

Mr. Brown: Do you want me to finish that question you asked, what the controversies are now? [184]

The Court: Yes, and then we can proceed.

Mr. Brown: Your Honor, we have filed an affidavit which contents can be summarized briefly as this, that since filing of this action there are

stipulations pertaining only to temporary matters concerning collective bargaining contract, to-wit: wages and hours. The first one that I wish to bring to the Court's attention is with the Roofers and Damp Waterproofers Workers Union Local 224, dated July 21, 1948. It is signed—this copy apparently has been signed by the union people and by the employers: "This will serve—

The Court: Let me ask you—we are relying upon this complaint, upon the cause of action, and any stipulations or conditions that arose July 21st would be two months after?

Mr. Griswold: That is right.

Mr. Brown: If the Court takes that position, we are out, because we assume, for the purpose of this motion, that the allegations of the complaint governs.

The Court: Aren't we bound, as a matter of rules of pleading, to all that is in the complaint and nothing that transpired afterward?

Mr. Brown: That is correct.

Mr. Griswold: Except on the moot question.

The Court: I mean as far as the controversy is concerned. Material things must have to do with matters in [185] existence at the time of the filing of the complaint.

Mr. Griswold: May I call your Honor's attention to one thing in the complaint?

The Court: Mr. Brown has indicated he is willing to review this complaint here before us all

and consent certain matters be considered stricken, as far as this present hearing is concerned. Do you want him to do that, Mr. McCarthy?

Mr. McCarthy: I think so, so we know what we are arguing about.

Mr. Brown: Now for the purpose of the record, taking the complaint, paragraph I, of course, pertains to the status of the employers association. That will remain in as is. Paragraph II: "That on the 24th day of May, 1947, the petitioner and the Building and Construction Trade Council of Reno, Nevada * * *" etc. That entire paragraph will remain in.

"That thereafter * * *", the following paragraph of paragraph II—"That thereafter and after the execution of the master agreement aforesaid the following respondent union, to-wit: * * *" naming them—"* * * did each append thereto as a part of Exhibit 'A' a stipulation wherein each of said respondent unions adopted the conditions of the said master agreement." We want that to remain in for the purpose of this argument.

Paragraph III: "That this action * * *" [186] etc., we desire that to remain in.

Now we want paragraph IV to remain in, "That prior to entering into the master agreement under date of May 24, 1947, appended hereto as Exhibit 'A,' the said Reno Employers Council did act for and on behalf of the following members: * * *" naming the individuals. Paragraph IV to remain in in its entirety.

Now we desire that all of paragraph V remain in.

Paragraph VI remain in.

Now in regard to paragraph VII, we would consent that some matters therein contained by considered parenthetically. "That your petitioner is informed and believes and therefore alleges the fact to be that respondents will not negotiate or bargain upon any other assumption than that they are not covered by the provisions of the Labor Management Relations Act of 1947 * * *," we desire that to be in, "* * * and that they have determined that they will not comply with the provisions of Section 8 A 3 of said Act; * * *" A period after Section 8A3, line 16, paragraph VII.

The Court: Strike from the words "Said Act"?

Mr. Brown: No, strike the following: "that your petitioner is informed and believes and therefore alleges the fact to be that the position of respondents whereby they have contended throughout their negotiations that they are not covered by said Labor Management Relations Act of 1947 is not in [187] good faith, but is a subterfuge for the purpose of coercing the petitioner into complying with the original demands for an amendment to said agreement under the master agreement, particularly in regard to wages * * *" etc. We do not desire to strike that from the complaint, but we desire to contend that it is immaterial at this time, because we have withdrawn our prayer for injunctive relief. It is merely in there——

The Court: The only part of paragraph VII that is material is that part that ends on line 16?

Mr. Brown: That is right, your Honor, and the rest, which would naturally allege an unfair labor practice, was inserted for the purpose of giving the Court information at the time of our original hearing.

We desire to leave number VIII in, the next paragraph, and number IX, of course, is in. Number X is in.

Now in the prayer—of course, the Court has already ruled on that matter and we will stipulate the Court may disregard paragraph 3 of the prayer, the temporary restraining order; also paragraph 4, “That in the event this Court finds that the Labor Management Relations Act of 1947 controls and governs the collective bargaining of the parties hereto that this Court order that any agreement arrived at by the parties hereto thereafter in respect to wages shall date from the date such agreement shall be entered into and shall in no event become retroactive from that date of May 21st, 1948.” We withdraw [188] that portion of the prayer; and of course 5 is immaterial at this time and we will withdraw that, and we will leave No. 6 in. All we are asking for is declaratory judgment.

Mr. McCarthy: Now may it please the Court, unless I misunderstood counsel, counsel stated (Quote) “All allegations which may tend to allege unfair labor practices are now out,” and it was because of that statement that I asked that he specify what portions are out. I would like to direct your Honor’s attention to paragraph VI of this complaint, which directly alleges an unfair labor prac-

tice, and ask your Honor to find that it is an unfair labor practice. They say:

“That the continuation of said condition aforesaid referred to as the ‘union security clause’ or ‘closed shop’ provision of the master contract would be in direct violation of Section 7 of the Labor Management Relations Act of 1947, the same being a Federal Statute.”

which is a direct charge of an unfair labor practice and as such, if counsel’s original statement is correct, should properly be stricken from this complaint, or his position is different than as he stated it generally to the Court and he is still asking this Court to determine unfair labor practice charges.

Mr. Brown: Your Honor, may I make this observation: Maybe I am not qualified—in other words, we put this complaint [189] in and I am not going to strike out anything by consent that might jeopardize our position in this respect. Our burden eventually in this picture is going to demonstrate to your Honor that we have an actual, right, concrete, adverse controversy which gives the Court an opportunity, if it has jurisdiction, to afford a remedy. We are not asking the Court to determine an unfair labor practice. We are merely putting in that allegation VI in relation to these other allegations, to show an actual dispute between these parties.

Mr. McCarthy: Requires finding of fact by this Court which I believe Mr. Penfield for the government will demonstrate your Honor can’t make.

Mr. Penfield: If I understand what Mr. Brown

has set forth, he is alleging now—if I understood the complaint as this originally was—he was asking this Court to determine (1) that the particular businesses and individuals involved were under the jurisdiction of the National Labor Relations Board and also was asking this Court to find that certain conduct which they had already engaged in or announced their intention to engage in, constituted a violation of that act.

The Court: I want to be sure that you stated what you intended to state. Maybe I misunderstood you. Mr. Brown's contention that you are considering right now, as I understand, is to determine whether these labor unions are under the Taft-Hartley Act, not the National Labor [190] Relations Board.

Mr. Penfield: That is what I meant to say. In other words, they are covered by its provisions, and as I understand it now—and I would like Mr. Brown to state if this is correct—now you are not seeking to have the Court adjudicate whether or not the conduct which has transpired, or is threatened to take place, constitutes a violation of the Taft-Hartley Act, but is to have this Court decide whether or not the Taft-Hartley Act can cover the particular individuals and types of businesses they are engaged in, is that correct?

Mr. Brown: May it please the Court and Mr. Penfield, that is absolutely correct. Our theory is this—the only issue of fact eventually that is going to develop is whether or not the operation of the industry, the operation of the unions and employers is in interstate commerce or so affects inter-

state commerce as to be governed by the Taft-Hartley Act. We are not asking the Court to adjudicate anything in respect to past acts, not asking the Court to declare unfair labor practices, and my answer to your last question is that our contention is limited to that very thing.

Mr. Penfield: I might say in that regard I do not think it fundamentally affects the position we take. Perhaps it narrows the thing down slightly more in respect to the relief asked. However, in discussing and arguing the matter, it will be necessary to consider, I think, both aspects of it [191] because both go to the same thing, the jurisdiction of a district court to decide on matters free of the coverage of the act with respect to its application to particular individuals or with respect to a particular violation, whether such violation with respect to these individuals or businesses is governed, and I do not think they can be entirely separated for the purposes of argument, although I will try to limit it as best I can.

Mr. Griswold: Before you start on your argument, Mr. Penfield, may I interrupt again for something I would like to ask. The Court will recall—it has come up now and your Honor asked what the actual controversy was. The Court said very properly that we were bound by the pleadings in the complaint. I want to call your Honor's attention to two or three statements that were made in the complaint, insofar as actual controversy is concerned. I refer now over to page 6, as I have it here, of the complaint, which is paragraph V, in

which this statement is made—I am reading from line 18:

“That it was the opinion of the Reno Employers Council after advice given by legal counsel, that the Labor Management Relations Act of 1947 prevented the continuation of the master agreement beyond May 21, 1948, without a revision of the union security provision of said contract as required by said Labor Management Relations Act of 1947.” [192]

In other words, the complaint says that the contract upon which this action is founded went out, unless your Honor stopped it, on May 21, 1948. Now the contract is the basis of the complaint and their allegation is when you did not continue that restraining order in effect, that the original contract was discontinued.

Now go over a little farther, and this is on the top of the next page, in the same paragraph:

“That thereafter and during said negotiations your petitioner took the position in such negotiations that the master agreement could not be continued after the date, May 21, 1948, without compliance with Section 8 A I of the Labor Management Relations Act of 1947, the same being Chapter 120, Public Law 101, which requires an election and affirmative vote of the employees on the question whether union membership be made a condition of employment.”

Now let us tie that in, if the Court please, with the next statement that is found over in the com-

plaint. I am referring now to page 12 and paragraph X, in which this statement is made, and then I want the two contracts that counsel was going to hand your Honor read to your Honor, so your Honor can get the full picture:

“That your petitioner does not contest or [193] object to the fact that respondents are the proper, recognized bargaining agents for the employees in the aforesaid industry for the purpose of negotiating and bargaining for hours, wages and working conditions, but that said petitioner does contend that respondents have not complied with the Labor Management Relations Act of 1947 in respect to having had the proper elections authorizing said bargaining agents of respondents herein to negotiate and contract for a union security clause in any collective bargaining contract arrived at after negotiation with petitioner; * * *”

Now the complaint itself, may it please the Court, states that the contract which is the basis of the complaint was discontinued on May 21st and would be discontinued unless your Honor had restrained it, and then the complaint says that these people, the unions, are the proper parties to bargain on wages and hours. Now if the Court please, if you have those now, I would like to hand to your Honor the contracts that were entered into, which are merely doing exactly what was said could be done in the complaint. Now insofar as actual controversy, going to the four corners of the complaint——

The Court (interrupting): First maybe we are going a little too far in advance. It seems to me that [194] normal presentation of this argument—this is just a suggestion—first, has the Court jurisdiction. We are not concerned with the question whether or not there is a controversy until we find whether or not we have jurisdiction to act if there was one.

Mr. Griswold: I agree with that, but your Honor asked the question as to actual controversy and I put this in because I was not satisfied with Mr. Brown's statement of the actual controversy. I didn't agree with him on it.

(On Motion to Dismiss.)

Mr. Penfield: Your Honor's observation is precisely as I was about to mention. We are not admitting there is a controversy or not. Assuming there is a controversy, for the purposes of argument, we maintain the Court does not have jurisdiction over the subject matter. Our motion raises three principal points: (1) that the Act does confer exclusive jurisdiction in the Board in all matters involving unfair labor practices, and (2) the Court does not have jurisdiction of the suit of private parties, that federal courts do not have jurisdiction in the suit of private parties to determine whether the operations of employers and labor organizations affect commerce within the mention of the Act. In other words, such jurisdiction is given by Congress to the Board initially and that jurisdiction which district courts do have in certain [195] labor matters covered by the Act is

strictly limited by certain sections of the Act, to which I will refer later, and to point out to the Court that this is not one of them; and (3) the plaintiff has failed to exhaust its administrative remedy under the provisions of the Act and therefore states no cause of action.

Now as I indicated before, I can not entirely separate these contentions and I think that actually they are one and the same thing. The Court's attention has already been called to certain allegations of the complaint. Certainly the complaint does allege, on pages 3 and 4 of the complaint, paragraph III, that the action arose under the commerce clause of the Constitution and under the Labor Management Relations Act of 1947. Now following this general allegation of the basis for jurisdiction, the complaint goes on to say that the plaintiff has members and to set forth the nature of each industry, how it has certain materials move across State lines, that there had been a contract in effect up until through May of 1948 and thereafter that defendant had notified plaintiff that it desired to negotiate, that a dispute had arisen concerning the applicability of the Labor Management Relations Act, referred to by its more common title, Taft-Hartley Act, but has taken the position that the provisions of the Act do not govern, and inasmuch as prior contracts did require closed shop, or what they call union referral clause, which were now outlawed [196] by the Taft-Hartley Act, the only way the union security clause could be obtained was for these defendants to go to the Board and participate in the type of election required by

Section 907, that in order to coerce plaintiff to agree to an increase in wage levels presently contained in the contract, defendant has taken the position that the Taft-Hartley Act did not apply and it was their position that they were not bargaining in good faith and they were asking this Court initially, at least, to enter a judgment to give them declaratory relief, deciding whether or not these operations did affect commerce within the meaning of the Act, and as I understand the original complaint, original prayer, they were also asking this Court to decide whether or not these provisions that the union was demanding were in themselves violation of the act. Now I understand that portion has been dropped, but they still want the court to decide that the type of business involved affects commerce to such an extent that the provisions of the act govern.

Now it is our position that we have exclusive jurisdiction to determine these questions initially and that there is no authority vested in this court at a suit of private parties to determine whether or not the Taft-Hartley Act provisions do govern. This goes to the question of whether or not this court can decide that this particular business affects commerce, at least for the purpose bringing it within the purview [197] of the Taft-Hartley Act, or whether or not they have engaged in unfair labor practices. Our position is they go back to the Wagner Act itself. The Wagner Act, when originally enacted in 1935 stated specifically in Section 10 (a) that the Board had exclusive jurisdiction over all matters involving unfair labor practices.

The exclusiveness of the Board's jurisdiction is not only borne out by the language of the Act, in which the word "exclusive" was used, but also borne out by the legislative history, which indicated an intent on the part of Congress to set up an administrative tribunal which in certain matters where labor relations affected commerce, that this administrative tribunal would be the first forum to which the parties could go. Provisions were made in the Act that if persons were aggrieved by the activities of this administrative tribunal, they could then go to the proper circuit court of appeals for a review. That was the parent of the Act. It was attacked repeatedly. Attempts were made in the early days of the Act to bring the matter before district courts by various types of proceedings. Many decisions were handed down. The matter was adjudicated by the Supreme Court. We have cited in our memorandum—I won't burden the Court with going into them now—at any rate, it is established without any question of——

The Court: What the Court is concerned with—I am anxious to be burdened with these authorities.

Mr. Penfield: We have submitted a rather extensive [198] memorandum in support of our position and on page 7 of the memorandum, pages 7 and 8, we have cited cases, Supreme Court cases and Circuit Court cases. These cases, bear in mind, of course, were decided after the Wagner Act—I refer your Honor to that at present as authority for the proposition that the Wagner Act conferred public rights that were enforceable by the Board

and the Board had exclusive initial jurisdiction. I think most of these cases make that matter very clear, and as we point out in our foot-note in our memorandum, the original Wagner Act, which was amended, did have a bill granting concurrent jurisdiction to the Board and district court to prevent unfair labor practices, and this was deleted by the committee in conference with the Senate and did not go into the bill. I do not know as counsel seriously challenged under the Wagner Act the Board's exclusive jurisdiction in matters like these. It was clear and supported by competent court authority, including the United States Supreme Court, in these cases we have cited. So the question then arises, did the enactment of the Taft-Hartley Act, slightly more than a year ago, change the situation, so that now this court would be given jurisdiction which it would not have had under the Wagner Act? We submit that no such change has come about; first, because of the language of the new act itself; second, because the legislative history in connection with the language, insofar as it might be construed, is in no way ambiguous and fully supports the construction [199] that we give to the language; and, third, because the courts before which the cases have come since the enactment of the Act have found—and we think with well-reasoned opinions in a number of them, with particular respect to the Amazon Cotton case in the 4th Circuit, to which I will refer later, that we feel support our position.

Mr. Brown: Your Honor, I might suggest to counsel and the Court that under the Amazon Cotton Case we are absolutely agreed that this court

had no jurisdiction—we will so stipulate—to prevent an unfair labor practice as it is provided for in the Wagner Act concerning an unfair labor practice. We admit that you have to go to your administrative remedies, you would have to exhaust them, and we would like to recommend that the only issue is this, does this court have jurisdiction, under declaratory judgment act, to say whether the Taft-Hartley Act applies or not. Counsel in his argument is absolutely correct on the law in respect to those other matters. Mr. Penfield, we will so stipulate.

The Court: Let me ask you this, Mr. Brown. You agree with Mr. Penfield that under the Wagner Act the district court had no jurisdiction to determine, that the matter was a matter for the administrative board of the National Labor Relations Board?

Mr. Brown: No, that isn't it at all, your Honor. We will admit that the Supreme Court of the United States, in [200] Bethlehem Steel vs. New York Labor Relations Board, held this view, that insofar as Section 10 (a) of the old Wagner Act, which is Section 10 (a) as amended of the new Taft-Hartley Act, that insofar as power of the Board to prevent unfair labor practices, that the Board and not the courts had exclusive jurisdiction. Now that is not the proposition here at all, may it please the court. We are not asking this Court to prevent an unfair labor practice. We are not suing for damages. We are merely asking whether, by virtue of being under interstate commerce, or affecting inter-

state commerce, are we under the fair labor standards.

The Court: Has the National Labor Relations Board the power to pass upon questions of its own jurisdiction?

Mr. Penfield: That is the initial problem in every case before us, whether the particular person and type of business engaged in affects commerce within the meaning of our Act.

The Court: In other words, the second contention that you make is that the plaintiffs here—that is what they are denominated—do have administrative remedy at the present time of applying to your Board for a determination whether or not the operation of these different unions, or any one of them, are within the Taft-Hartley Act?

Mr. Penfield: Precisely.

Mr. Brown: May I just point out one thing. I want [201] to get the record straight, may it please the Court. We have Exhibit "E" to our complaint, which consists of Mr. Penfield's boss's letter to our clients, and it reads as follows:

"National Labor Relations Board
Washington, D. C.

April 8, 1948

"Reno Employers Council
Attention Mr. W. M. Caldwell
P. O. Box 2390
Reno, Nevada
Gentlemen:

"This will acknowledge your letter of March 26, 1948, in which you make inquiry with respect to

the proceedings required for the renewal of the agreement between the Reno Employers Council and the Building and Construction Trades Council of Reno.

“The problem which you pose is a controversial one which doubtlessly will at some time be the subject of Board and Court decisions, and is one to which I do not feel justified in giving a solution without very thorough and careful study. I regret, therefore, that I find it necessary to decline to advise you on this matter. I am sure that you will understand the reason when you consider how many such requests have been directed to me in these busy times. I sincerely hope that these problems will soon become settled and that your legal advisers can now give you the assistance which you need.

“Returned herewith is the copy of the agreement which you designated as Exhibit 1, in your March 26th letter.

“Sincerely yours,

/s/ ROBERT N. DENHAM,
General Counsel.” [202]

Mr. Penfield: Well, precisely, your Honor. We have every day in our regional office, and I assume it exists all over the country and in Washington, people coming in and asking what about this, does your Act cover it, and that sort of thing. We are operating, the Board, as a quasi-judicial agency. They are asking us to decide matters. We could not give anybody a binding opinion. It is a controver-

sial question but who is to decide it? The Board. Not this Court, and that is the question.

The Court: Let me make an observation here to see whether I have the right understanding of Mr. Denham's letter. It says, the problems will doubtlessly be the subject of Board and Court decisions. Now wouldn't that mean that the Board might decide this present question? Then if the parties who felt aggrieved desire to take it into Court, they would go into the Circuit Court of Appeals?

Mr. Penfield: Precisely, that is exactly what would happen, and there are instances where the matter might come before the district court, if the Board brought it on a——

The Court: (Interrupting) Now there is one principle of law that seems to me to be pretty persuasive and applicable to such a situation as this, that a person who feels aggrieved and has either administrative remedy or a court remedy, must pursue their administrative remedy [203] first. Now if it is conceded here by the plaintiff that the only questions which are raised here now before this Court could be determined by the National Labor Relations Board, I think we ought to be through with this. If these very questions here that are presented to the Court today, if the National Labor Relations Board, an administrative body, has the power and authority to determine whether or not the Taft-Hartley Act applies to this group of unions, or any one of them, it seems to me that the plaintiffs here should first exhaust their administrative remedy.

Mr. Griswold: That is right.

The Court: If it is conceded by Mr. Brown that the National Labor Relations Board has the authority and power, if an application was made to it, to determine first the question——

Mr. Brown (Interrupting): No, I have not made that contention, your Honor.

The Court: You dispute that, Mr. Brown?

Mr. Brown: Yes, we dispute that.

The Court: Well, it appears to the Court that the National Labor Relations Board has the power to determine whether or not these unions, or any one of them, are subject to the Taft-Hartley law, on the ground there is an administrative remedy which has not been exhausted.

Mr. Penfield: In that connection, I think it perfectly [204] clear that we do have the power. If you look at the allegations of the complaint, they set forth that this difference arose over the application of the Act. Now if you look to the provisions of the Act, the Board does not have what you might call automatic jurisdiction of everything that may be within its purview. It is necessary for a party to file with us documents known either as a charge alleging that somebody is engaged in unfair labor practices, or a petition alleging that there exists a question concerning representation which it asks us to determine. Now we have had this matter up. We have a case on trial in Oregon at the very moment, where the issue was raised by the union insisting upon provisions in its contract which it claimed did not violate the provisions of Section

8 A 3 of the Act, with respect to the closed shop, a union provision which that proposes to outlaw. The union took that position and claimed that the Act did not cover that. The employer said it did cover it. The union said, "We insist on bargaining with you and as a condition that you agree with this provision you have always had in your contract for many years and we feel we have the right to do it." They did not follow the law. The employer came to us and filed charges, alleging the union was refusing to act in good faith for the reason that the union was insisting upon this under the act and had no right to insist upon it. Now we issue a complaint upon that basis—there is more than one case, I am referring [205] only to one with which I am familiar, but that is exactly the way an issue like that can be decided. One party is wrong, that is true of every lawsuit, and we then have before us the question of whether or not—clearly, if the union's position is that its business does not affect interstate commerce, we have no jurisdiction in matters which do not affect commerce within the meaning of our act. It is very controversial. Some cases are clear, some are borderline, there are some cases in which you have court decisions, some cases none. We proceeded in that case now that went to Mr. Denham. They told him about this dispute, asked his opinion, he said he couldn't give an opinion, that is a matter that might come before the Board and the Board would have had to decide. He could not give an opinion any more than your Honor could if somebody asked

you whether any conduct violated the law. You might discuss the matter, but couldn't give an opinion, but courts do not determine that sort of thing and boards and quasi-judicial agencies do not. This matter can be raised in the same way. The employer could have taken the position that there was coverage, the union was taking the position there was no coverage. One or the other is true. If a charge was filed with us, we could determine, but we still can determine if it still is a matter of issue, and that is precisely our point here.

The Court: Did Mr. Brown contend that the National [206] Labor Relations Board has not power and authority to determine whether or not these particular unions are within the purview of the Labor Management Act and Taft-Hartley law?

Mr. Brown: No, I do not contend that point, your Honor, if I may respectfully suggest—the Board only has such power as is conferred by this law, Section 10 (a), and the following sections there. The Board is empowered as hereinbefore provided, “to prevent any person from engaging in any unfair labor practice affecting commerce.” This power “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.” Now I think the theory that perhaps the Court has in mind and Mr. Penfield and some of us is that we are seeking, by way of remedy, a declaratory judgment of some affirmative relief. We have no unfair labor practices at all, your Honor. We are merely asking whether this book applies or the other one does.

The Court: Let me ask a question there. Suppose this Court did determine in this action that the Act applied, what would you do next?

Mr. Brown: That would become *res adjudicata*.

The Court: What is your next step?

Mr. Brown: The next step, your Honor, is to negotiate and bargain with these respondents and complete a contract [207] covering all the conditions. That is our plan.

Mr. Penfield: I can see the next step very easily, your Honor. If the Court made an adjudication to that effect that the Act did cover, they would then say, "You have to go to the Board and go through proper allegations." We are charged under the law with determining these matters. Maybe we differ. It was for this very reason that the Board has exclusive jurisdiction. An attempt was made to synchronize it so we wouldn't have the courts all over the country coming to one conclusion and the Board coming to another conclusion, with attendant abuses.

Mr. Brown: If Mr. Penfield can point to any authority in law, case or statute, which says that the Labor Relations Board has the authority to determine upon the question, is this industry covered by the Act or is it not, I would like to hear it. We contend, your Honor, that before that matter is a matter to be determined by the National Labor Relations Board, there must be a charge filed with the National Labor Relations Board, of which the question of jurisdiction is but one element to be determined, but that this court is not asked to prevent an unfair labor practice. There is not a single

iota of language in the Taft-Hartley Act or the Wagner Act, nor any other decision of this court that way, but we have a brand new decision in the State of New Hampshire under the declaratory [208] judgment act, not a federal case, but the Supreme Court of New Hampshire said it was proper, under declaratory judgment for the court, under union declaratory act, which is essentially your federal act, to determine whether or not the Taft-Hartley governed or the Willey Act governed, and that is International Brotherhood of Teamsters, etc., vs. Riley, decided June 1, 1948 of this year.

Mr. McCarthy: May it please the Court, this matter was before the State Supreme Court of California just the other day in the case of Gerry against Superior Court of Los Angeles. It was decided on June 16, 1948. This is in an equity court and no matter what you do with it, this is still an equity court, and if your Honor decided injunction was proper, you would have to issue it, whether it was in the prayer or not. The court of equity, once it takes a dispute, must totally solve it. That is the basis of our equity jurisdiction, not the prayer for relief, that gives this court equity powers.

Now the situation here is that the Court was not interested in injunctive features in the slightest. The Court was interested primarily in jurisdiction. This arose on the question of concurrent jurisdiction, and the same situation applies to the federal district court:

"It is the petitioner's argument that the state courts have concurrent jurisdiction with [209] the

federal courts to enforce rights created by a federal statute. Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal laws unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it. (Citing cases.) In *Bethlehem Steel Co. v. New York State Labor Relations Board*, April, 1947, 330 S. T. 767, 67 S. Ct. 1026, 1029, 91 L. Ed. 1234, it was recognized as a settled rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of that result be wanting citing *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432. At the same time the Supreme Court also pointed out that Congress had not seen fit to lay down even a general guide to the construction of the National Labor Relations Act as it sometimes does (referring to the Securities Act of 1933, Sec. 18, 48 Stat. 85, 15 U. S. C. A. Sec. 77r; Securities Exchange Act of 1934, Sec. 28, 48 Stat. 903, 15 U. S. C. A. Sec. 78bb; United States Warehouse Act, Sec. 29, 39 Stat. 490, 46 Stat. 1465, 7 U. S. C. A. Sec. 269) [210] by saying that its regulation either shall or shall not exclude state action. This court has also recognized that when the question is whether a state court may take jurisdiction of matters arising under a federal law inquiry is first directed to the intention of Congress in that regard. *Miller v. Municipal Court*, *supra*, 22 Cal.

2d 818, 836, 142 P. 2d 297. Therefore, whether concurrent state jurisdiction exists is a matter to be determined from a construction of the act itself."

The California Supreme Court recognized you simply can not just take this act as amended, but you have to go back to the original act and properly consider it:

"A proper conclusion depends in part upon the construction of the act before the 1947 amendments. Pursuant to section 10 of the National Labor Relations Act, 29 U. S. C. A. Sec. 160, the National Labor Relations Board was empowered, upon issuing a complaint and notice, to conduct a hearing on a charge of employer unfair labor practices defined in the act and to issue a cease and desist order, together with orders for affirmative relief. Such orders were enforced by petition to the Circuit Court of Appeals which was empowered to conduct a hearing and render a decree (including temporary injunctive [211] relief) enforcing, modifying and enforcing, or setting aside the order of the board. For the purposes of section 10, the limitations imposed by the Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. A. Secs. 101-115, upon the issuance of restraining orders and injunctions in cases involving labor disputes were removed.

"By section 10(a) before amendment the power thus reposed in the National Labor Relations Board was made 'exclusive' and not 'affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.' In *Amalgamated Utility Workers v. Consoli-*

dated Edison Co., 309 U.S. 261, 264, 60 S.Ct. 561, 563, 84 L. Ed. 738, the Supreme Court said, with reference to providing the remedy for the specified unfair labor practices: 'Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.' The Supreme Court pointed out that the course of proceedings was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair [212] labor practice; that the board was chosen as an instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized. That section 10 of the National Labor Relations Act committed to the board the exclusive power to decide whether unfair labor practices by the employer had been engaged in and to determine the action that should be taken to remove or avoid the consequences thereof was again stated in *National Licorice Co. v. National Labor Relations Board*, * * *

I am omitting the citations as I read:

"Also, *National Labor Relations Board vs. Jones & Laughlin Steel Corporation* * * *

That, your Honor, is the first case under this act and the leading case:

“* * * upheld as constitutional the vesting of the exclusive power in the board. The most recent pronouncement of the Supreme Court to come to our attention is in *Bethlehem Steel Co. v. New York State Labor Relations Board* * * * wherein it was held that state and [213] federal action covering the subject matter of the National Labor Relations Act could no co-exist. Similarly in *Blankenship v. Kurfman*, 1938, 7 Cir., 96 Fed. 2d 450, 454, it was held that the National Labor Relations Act might not be construed as intending to create rights for employees which could be enforced in federal courts independently of action by the National Labor Relations Board; that it was clear that the only rights which were made enforceable by the Act were those which had been determined by the board to exist under the facts of each case, and that when determined the method of enforcing them provided by the Act must be followed. In *Fur Workers Union, Local 72, v. Fur Workers Union*, 70 App. D. C. 122, 105 F. 2d. 1, with reliance on the *Blankenship* case, such double jurisdiction was likewise held to be contrary to the intent manifested by the provisions of the National Labor Relations Act.”

And I might say the last two cases I have read from the quotations here are federal circuit court decisions. The *Blankenship* case was a circuit court opinion and the *Fur Workers* was a circuit court opinion.

“The Supreme Court of the United States has also recognized the application of the ‘long settled

rule of judicial administration that no [214] one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted'—referring to the application to the National Labor Relations Board for determination of the factual issues and the appropriate relief designated in the National Labor Relations Act."

Citing Supreme Court cases, citing numerous cases here also.

"In a different category are cases such as *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board * * **, wherein it was held that the state's exercise of its police power (e. g., the prevention of mass picketing of the employer's factory, threatening personal injury or property damage to employees desiring to work, obstructing entrance to and egress from the employer's factory, obstructing the streets and public roads, picketing the homes of employees, and other breaches of the peace in connection with labor disputes) was not intended to be excluded by the provisions of the National Labor Relations Act, and that the exercise of that power by the state could stand consistently with the operation of the federal act. State power in the field not occupied by the National Labor Relations Act has been appropriately exercised or recognized in other cases. (Citing cases.) Cases relied on which were [215] decided before the 1947 Act (assuming they involved interstate commerce), in which peaceful picketing for unlawful purposes has been enjoined by state action are therefore not in point. Under the National

Labor Relations Act before amendment by the 1947 Act, unfair labor practices on the part of employee organizations were not included within the jurisdiction of the National Labor Relations Board. It was therefore a sphere in which action could be initiated in the courts.

“As noted, the National Labor Relations Act before its amendment by the 1947 Act did not define or place within the scope of the National Labor Relations Board’s jurisdiction unfair labor practices on the part of labor organizations. By section 8 (b) of the 1947 Act the conduct charged to the defendant unions in this case is declared to be unfair labor practices.

“Prior to the 1947 amendment the powers of the board under section 10 of the act were limited to the issuance of cease and desist orders against employers, after investigation and hearing, and the enforcement thereof by petition to the Circuit Court of Appeals for injunction and other process. Concurrently with the inclusion of the 1947 Act of declared [216] unfair labor practices by labor organizations (section 8(b)), Congress deemed it expedient to provide accelerated means for obtaining injunctive orders. Under the 1947 Act a temporary restraining order may be obtained after the issuance of a complaint by the board as to any unfair labor practice, by petition filed in the United States District Court, upon notice and hearing (sec. 10(j)). In certain cases of unfair labor practices by labor organizations designated in section 8(b), the duty to apply for temporary injunctive relief is mandatory whenever preliminary investi-

gation by the board indicates reasonable cause for belief that the charge is true (sec. 10(1)). Section 10(h) removes the restrictions and limitations upon the equity jurisdiction of United States Courts imposed by the Norris-LaGuardia Act insofar as action by the National Labor Relations Board is concerned.”

(Citing cases.)

“The provision of section 303(a) of the 1947 Act restricting the unlawfulness there declared to the purposes of that section discloses an intent not to authorize criminal prosecutions for the commission of the specified unfair labor practices by labor organizations. The section then permits suits in district courts of the United States [217] and other courts having jurisdiction of the parties for the recovery of damages occurring from the ‘unlawful’ acts on the part of labor organizations. This is the only jurisdiction over suits by private parties which is expressly recognized by the act. In designating the nature of the board’s power in section 10(a) of the 1947 Act, Congress omitted the word ‘exclusive’ from the National Relations Act. The petitioner argues that the omission implies an intent to permit injunctive relief as well as damages at the suit of parties injured by the designated unfair labor practices committed by labor organizations. But in amending that section to eliminate the word ‘exclusive,’ Congress also added a proviso empowering the National Labor Relations Board by agreement to cede to state agencies jurisdiction in any industry (with certain exceptions) although

a labor dispute affecting interstate commerce was involved, where the local regulatory provisions were consistent with the federal act. The word 'exclusive' would be inconsistent with the exercise of ceded power by agencies created pursuant to the state regulatory legislation invited by the proviso.

"The provisions of the 1947 Act show an intent to preserve the functional purposes of the [218] National Labor Relations Act which increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. This intent is also indicated by the record of the conference and committee reports and congressional debates.

"The pertinent portions of those reports and debates were reviewed by the Fourth Circuit Court of Appeals in *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 167 F. 2d, 183, 188. The appeal in that case involved the jurisdiction of the federal district court under the National Labor Relations Act as amended by the 1947 Act to issue an injunctive order at the suit of a labor organization. A mandatory injunction theretofore issued by the District Court required the employer to bargain collectively with a union of its employees.

* * *''

In other words, the Amazon case was reverse of what you have today. There the union was asking that the employer be ordered by the court to bargain.

“* * * It was concluded that the history of the National Labor Relations Act and the decisions rendered thereunder made it clear that the purpose of the Act was to establish a single paramount [219] administrative authority in connection with the development of federal law regarding collective bargaining that the only rights made enforceable were those determined by the National Labor Relations Board to exist under the facts of each case; that there was nothing in the text or the history of the enactment of the 1947 Act which indicated a departure from the foregoing purposes or policies, or showed any intention to vest jurisdiction in the courts except to the limited extent that jurisdiction was expressly conferred; that only under Section 303 was jurisdiction given to entertain actions brought by private parties and then only to render judgments for damages arising out of jurisdictional strikes and boycotts. That court also reached the conclusion from a study of the new Act and the conference reports that the purpose of omitting the word ‘exclusive’ from Section 10(a) of the National Labor Relations Act was merely to synchronize with the power reposed in the board the added elements of jurisdiction expressly vested in the courts and which may be ceded to state agencies under the 1947 proviso of said section. The court said: ‘There is nothing in the history of the Act, the reports of committees or the debates in Congress which even vaguely supports [220] the contention that its effect was to vest jurisdiction in the District Courts to grant relief against unfair labor practices. Everything said by any one re-

motely bearing on the matter is to the contrary.
* * * It is hardly thinkable that, if the effect of the Labor Management Relations Act was to make a fundamental change in the jurisdiction to deal with unfair labor practices, this important fact would not have dawned upon some members of the House or the Senate and have been referred to in the course of the lengthy debate of a measure that was passed over a Presidential veto. That no such suggestion was made gives ample support to the interpretation which, as we have already indicated, we would place upon the text of the Act if the history of its passage and Congressional debates were not available to us.' The court mentioned cases in trial courts where injunctive relief had been denied (*Douds v. Wine, Liquor & Distillery Workers Union*, D. C. 75 F. Supp. 447; *Fitzgerald v. Douds*, D. C., 76 F. Supp. 597, Southern District of New York; and the present case),
* * *"

In other words, the Fourth Circuit referred to the Gerry case:

"* * * and referred to the disastrous consequences * * *" and this is very important:

"* * * to any successful administration of the labor [221] law, and the repugnance to the orderly administration of justice, if courts should take coordinate jurisdiction with the National Labor Relations Board to restrain unfair labor practices. The court also noted the absurdity which would result from unauthorized court actions at the suit of labor organizations, since Congress clearly intended to withhold redress on a charge of unfair

labor practices made by a labor organization unless the latter had filed certain financial statements and affidavits (Sec. 9(f), (g), (h)). Not overlooked was the possibility that unusual cases might arise where courts of equity could be called upon to protect the rights created by the act. But the court recognized that the case involved nothing out of the ordinary, that the procedure before the board provided an adequate administrative remedy, and that the extraordinary powers of a court of equity could not be invoked until the administrative remedy had been exhausted. (Citing cases.) No question is here presented as to what the situation would be if the petitioner had exhausted its administrative remedy.

“The reasons for concluding that express jurisdiction was not conferred on federal trial courts at the suit of a private party to restrain alleged unfair labor practices, as held in the *Amazon Cotton [222] Mill Co.* case, likewise compel the conclusion that the nature and purpose of the act preclude state action in the field of the jurisdiction vested in the National Labor Relations Board except to the extent that it has been expressly conferred or ceded, and that this is so whether such action be initiated by an employer or by a labor organization. General language in *Park & Tilford Import Corporation v. International, etc., of Teamsters*, *supra*, 27 Cal. 2d at page 604 et seq., 165 P. 2d at page 894, and *Lillefloren v. Superior Court*, 31 Cal. 2d . . . , . . . , 189 P. 2d 265, indicating that the state courts might enjoin union activities affecting interstate commerce if engaged in for

an unlawful purpose is not controlling here. It is necessarily restricted to the period prior to the effective date of the 1947 Act when no administrative remedy was afforded to prevent unfair labor practices on the part of labor organizations.

“Other contentions do not require specific notice. The petitioner makes much of the fact that the defendant unions, as alleged in the complaint in the action, have not filed the required financial reports and affidavits under the 1947 Act which are a prerequisite to the exercise of jurisdiction by the [223] Labor Relations Board * * *” etc., and so on.

The Court: I am ready to take this position now, that the National Labor Relations Board have exclusive jurisdiction in all matters having to do with charges of unfair labor practices. I am also inclined, I might say, to hold—and I will hold, unless Mr. Brown can show me some good authority to the contrary—that the National Labor Relations Board has exclusive jurisdiction in the first instance to determine whether or not it has jurisdiction of any matter which may arise out of the Taft-Hartley law.

Mr. McCarthy: If you would permit me please, your Honor, because I would like to have you notice this in reference to the Gerry case. The Gerry case made specific reference to 8 A 3 of the Act when the court said they had no jurisdiction to determine such matters. I should like to call your attention to the complaint, Section 7. Mr. Brown asked me why I felt that this was applicable. This is petitioner’s allegation in paragraph VII:

“That your petitioner is informed and believes and therefore alleges the fact to be that respondents will not negotiate or bargain upon any other assumption than that they are not covered by the provisions of the Labor Management Relations Act of 1947 and that they have determined that they [224] will not comply with the provisions of Section 8 A 3 of said Act; * * *” The very section that is referred to in the Gerry case itself.

The Court: That 8 A 3, what number is that in this U.S.C.A.?

Mr. McCarthy: It would be Section 3.

“* * * Provided, that nothing in this Act, or in any other statute of the United States, shall preclude any employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement * * *.”

Now the charge is made here that this union will not comply [225] with this provision of the

Act and in the Gerry case the court says that a charge to that effect is charging an unfair labor practice and refusal to bargain in good faith, and that is a matter for the Board. Now you can't deliberately charge people with committing unfair labor practices in specific language and then say, well, because we do not ask for that kind of relief, the charge ceases to be a charge of unfair labor practices. They say further:

"That the continuation of said condition aforesaid referred to as the 'union security clause' or 'closed shop' provision of the master contract would be in direct violation of Section 7 of the Labor Management Relations Act of 1947, the same being a Federal Statute."

That is the concluding sentence of Paragraph VI.

Now if it is a direct violation, it is an unfair labor practice. If it is an unfair labor practice, the law under the Gerry case must decide. There is no such device as declaratory relief to take away jurisdiction from one federal agency and allege it in a court, because it is only a device. They are saying, "We are charging you with all these unfair labor practices; we have a forum where we can have this matter determined; we know that the district court has no jurisdiction to determine them, so we are going to ask you for an advisory opinion by way of declaratory relief, and by [226] means of that device we are going to confer that jurisdiction which Congress has expressly refused to the district court." I say you just can't do it.

Mr. Penfield: If the Court please, a lot of time was had in Mr. McCarthy's reading of the Gerry case. The Court, I think, stated better than I possibly could the argument concerning this whole jurisdictional question, and there is no point in my repeating it. There are a couple of points your Honor suggested that I do want to stress.

Mr. Brown now says that he concedes that the Board has jurisdiction to decide unfair labor practices, but he says, where is authority that only the Board can decide whether a particular business affects commerce. I submit Section 8(a) of the Act sets forth the Board has jurisdiction over unfair labor practices affecting commerce. What is unfair labor practice? To determine whether or not there is an unfair labor practice, we have to determine whether or not it affects commerce, and he is asking to determine that. In other words, he is asking this Court to assume concurrent jurisdiction with something that the Board has to do in every unfair labor practice dispute that comes up. We submit that can not be done. As the Gerry case points out very clearly, the jurisdiction of this court is limited by the Congress act to injunction suits, limited to damage suits in certain types of cases under Section 303, and that is the extent of the jurisdiction [227] and there isn't any concurrent jurisdiction in matters relating to unfair labor practices and the question of whether the matter affects commerce or not obviously relates to unfair labor practices, otherwise what is the purpose, that this particular business affects commerce? Unless

it has relationship to unfair labor practices and matters set forth in the complaint, it is meaningless. So we submit the whole thing has to come through us. The question whether business affects commerce, as well as whether it is an unfair labor practice, is something that we decide in every case. We submit that that jurisdiction should be in us and I would like to submit the matter on that issue.

The Court: Before Mr. Brown proceeds, it might be well to take a recess at this time until 1:30.

Mr. McCarthy: First I would like to pose this problem because I think in fairness to Mr. Brown he should face it. If your Honor should decide that these respective parties are in a business which affects interstate commerce within the meaning of the Act and make a declaratory judgment, the union conducted the election provided for in Section 8 A 3, the Board would, upon the filing of that petition, have to make its determination as to whether or not you were in a business affecting commerce. If the Board decided you were not in a business affecting commerce that would permit any election, they would say that we are free of any restrictions of the 'Taft- [228] Hartley Act in our dealing with the employers, and we would find ourselves in the position of having this court having said one thing and the Board having said the direct opposite and these people would have us telling you that you have to sign a closed shop contract and like it,

insofar as the Taft-Hartley Act is concerned, because the Labor Relations Board said it did not have jurisdiction and therefore we are free to insist upon it.

The Court: After hearing the argument this morning, I do not think you have anything to worry about on that score, unless Mr. Brown is able to establish to me that the International Labor Relations Board has no jurisdiction to determine whether or not a certain group or union is affected by interstate commerce, or affects interstate commerce. In other words, if the National Labor Relations Board has jurisdiction in any case that may be presented to it involving labor practices, unfair or otherwise, to determine whether or not the Taft-Hartley law applies, if such jurisdiction exists, and if it is concurrent in the court—it may not be—my view is that the administrative remedy should be first pursued and I will dismiss the complaint. That is the way I feel about it, so what Mr. McCarthy has to say here would not be important to consider unless I change my views after hearing Mr. Brown. Unless he convinces me that the National [229] Relations Board has no jurisdiction.

(Recess taken at 12:00 noon.)

Afternoon Session—1:30 p.m.

The Court: Are you ready to proceed now, gentlemen?

Mr. Brown: Yes, your Honor. May it please the Court, this matter on the motions that I think

your Honor is interested in, should be interested **in at this time**, is this: Does this Court have jurisdiction, or is the jurisdiction to determine the question of whether or not this particular industry, the employers and employees, in their negotiations are governed by the federal act, whether or not that question to determine is exclusively within the jurisdiction of the National Labor Relations Board. In other words, does this Court have any jurisdiction under the complaint seeking a statutory remedy in the nature of a declaratory judgment.

Now I am going to indulge and invite the Court's attention to the proposition that since we have the burden to bear, if the Court will be kind enough to bear with us until we develop our theory, it will be appreciated. Now in the first place, we recognize that Section 400, Title 28, which provides for the remedy of a declaratory judgment, does not in any way confer additional jurisdiction upon federal district courts. That section is essentially one which affords an additional remedy which may be pursued in certain cases to [230] obtain an adjudication of disputed facts or law in an actual controversy, and therefore we would like to discuss this thing and make two points: first, we have a remedy which enables this Court to grant the relief prayed for in the complaint, but prior to applying this remedy, the first question is, does the Court have jurisdiction. Now I am not talking about exclusive jurisdiction, I am talking about jurisdiction initially and then we will endeavor to

meet the question of exclusive jurisdiction. This action, if it be justified at all, is brought under the jurisdiction of the district court by virtue of Section 41, Sub-paragraph 8, of Title 28 U.S.C.A. It reads:

“The District Courts shall have original jurisdiction as follows: * * *”

and then after the enumeration of forty different instances, Section 41(8): “Suits under interstate commerce laws.” Now this procedure is within the jurisdiction of federal courts under the provision of Congress conferring the jurisdiction under this section of Title 28, providing for jurisdiction in federal courts by reason of the involvement of a federal statute concerning interstate commerce. The statute which petitioner asked to have declared applicable under Labor Management Relations Act of 1947 provides—now there isn’t any change essentially in the jurisdictional provision of the Wagner Act and the Taft-Hartley Act, but Section 1, Sub-section (b) of the Taft-Hartley Act reads as follows: [231]

“It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor

and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.”

Now Section 101, the National Labor Relations Act, is hereby amended to read as follows:

“The denial of some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially [232] affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; * * *”

And then Section 2 provides a definition, subparagraph 6:

“The term ‘commerce’ means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

“(7) The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”

Whether we are engaged in interstate commerce, of course, if the case were only on that, to be heard on the merits, would be immaterial at this time. I am merely indicating those provisions of the Taft-Hartley Act, Section 41, sub-paragraph 8 of Title 28, U.S.C.A., as to original jurisdiction [233] in cases where the suits affect interstate commerce law. The Taft-Hartley Act is obviously one interstate commerce act of Congress.

Now in *American Federation of Labor vs. Watson*, 90 Law Ed. 873—and I will have to get the U. S. citation, I know your Honor desires that—in that case a number of Florida local labor organizations and individuals engaged in interstate commerce alleged that the amendment to the Florida Constitution prohibiting closed shops conflicted with the old National Labor Relations Act. The Supreme Court of the United States sustained the jurisdiction of the district court in the following language:

“For it is the view of a majority of the Court that jurisdiction is found in Section 24(8) of the Judicial Code, 28 U.S.C.A. Section 41(8), 7 F.C.A. Title 28, Section 41(8), which grants the federal district courts jurisdiction of all ‘suits and proceedings arising under any law regulating commerce.’ * * *”

Now, of course, that section has been amended now to read:

“Suits under interstate commerce law.”

“* * * As we have said, the bill alleges a conflict between the Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives [234] of employees under that Act, are granted as a matter of federal law the right to use the closed-shop agreement or, alternatively, that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop. Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by State action is a suit ‘arising under’ a federal law ‘regulating commerce.’ ”

Citing a number of cases.

Now may it please the Court, that case was a little different on the facts than our case, because in that case the unions had requested the federal district court for injunction against the State authorities from bringing any action under the Florida anti-closed shop act, and the Supreme Court dismissed that because they said, after they sustained the jurisdiction of the lower court, they said that irreparable injury was not shown, there is no injunctive relief. The case is cited to the particular point of jurisdiction of this court.

Now the next point I want to take up is this: the question of whether or not—now I want to leave this exclusive [235] jurisdiction of the National Labor Relations Board to the end to tie in with the balance of this. The next question logically is, is the declaratory judgment remedy proper? I have run across one case since we discussed this matter before your Honor before. It will be remembered that the federal declaratory judgment act was primarily the outgrowth of your union declaratory acts which existed in most of the States, one of those States being the State of New Hampshire and in June of this year, 1948, the Supreme Court of New Hampshire, in the case of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 633, et al. v. Riley, et al., cited in 59 Atlantic (2), at page 476, they had occasion there to say something about the appropriateness of the declaratory remedy in respect to this very matter. In the syllabus as contained in the advance sheet we find the following:

“The purpose of the declaratory judgment law is to make disputes as to rights or titles justiciable without proof of a wrong committed by one party against the other.”

Then they go on, the second paragraph of the syllabus:

“Question whether the Taft-Hartley Act or the Willey Act * * *”

Now the Willey Act was a State Act:

“* * * determined validity of contract between union [236] and employer was a proper matter

to be determined by a declaratory judgment in advance of actual controversy between the parties, and petition was improperly dismissed as to employer though he did not claim adversely to any right of the union."

And then they go on to hold in this particular case essentially is: they gave a declaratory judgment, the Supreme Court of New Hampshire, and they said that where Congress gave the authority to legislate in respect to matters affecting interstate commerce, that in their opinion the Taft-Hartley bill governed the provisions of this particular contract, but the interesting thing in that case is the statement of facts. This was a petition in the New Hampshire court for a declaratory judgment by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 633, an affiliate of the American Federation of Labor, and it was against William H. Riley, Labor Commissioner, Ernest R. D'Amours, Attorney General, and others, for determining whether provisions of Laws 1947, Title 195, are applicable to petitioners. The case was transferred without ruling on an agreed statement of facts.

"Petition for a declaratory judgment, in which it is alleged that the petitioners, on February 8, 1947, entered into a contract with the defendant Faltin to take effect as of January 1, 1947, and continue [237] in effect until twelve o'clock midnight, December 31, 1948; that one of the terms of said contract is as follows:

“(c) When an Employer lacks a full complement of men, the Union (Business Agent, office of shop steward) shall be notified. If the Union can not furnish members, upon request by Employers, non-members may be employed subject to the terms of this agreement, but such non-members must meet the membership requirements of the Union within two (2) weeks from date of employment. The Employer will, after three (3) days notice from an authorized representative of the Union, discharge any employee who fails to become, or to remain, a member in good standing of the Union;’ that the defendants Riley and D’Amours, who are respectively the Labor Commissioner and the Attorney General of New Hampshire, claim that ‘provisions in said contract between said Local Union No. 633 and the said defendant Joseph E. Faltin requiring membership in Local Union No. 633 as a condition of securing or continuing the employment of any person are unlawful by virtue of Chapter 195 of the Laws of 1947, and have informed your petitioners that they will be prosecuted in the event that said Local Union No. 633 or any of your petitioners undertake to enforce and carry out the [238] provisions of said contract requiring membership in said Union as a condition of securing or continuing the employment of any person.’ ”

Now the court went on:

“It is the position of the petitioners that the Labor Management Relations Act of 1947, 29 U. S. C. A. Section 141 et seq., supersedes the provisions of Laws of 1947, Chapter 195, so far as the pro-

visions thereof are applicable to the business engaged in by your petitioners and the defendant Joseph E. Faltin, which is conceded to be wholly interstate commerce, and that said contract will be lawful until the termination of said contract on December 31, 1948 by virtue of the provisions of said contract and the provisions of Section 102 of the Labor Management Relations Act of 1947, passed by the Congress of the United States of America. The petitioners, accordingly, pray for a declaratory judgment, 1, that the provisions of Laws 1947, c. 195, are not applicable to petitioners and the defendant Joseph E. Faltin as proprietor of J. E. Faltin Transportation Company in the business in which they are engaged; 2, that the above article between Local Union No. 633 and the defendant Joseph E. Faltin is not unlawful and that the petitioners will not be liable to prosecution or for [239] civil liability for damages by reason of any provisions in the Laws of 1947, Chapter 195.

“Transferred without ruling by Lampron, J., upon an agreed statement of facts.”

Then the case goes on and goes into the proposition of whether or not the Taft-Hartley Law applies or the State law, and the court finally comes down:

“It is, therefore, our conclusion that there is nothing in Section 14(b) of the Taft-Hartley Act which abrogates the rule that ‘Congress having entered this field of regulation, it follows from the paramount character of its authority that State regulation of the subject-matter is excluded.’ ”

Citing *Texas & Pacific Railway Co. v. Rugsby*, supra (241 U. S. 33, 36 S. Ct. 485.)

“* * * and we accordingly hold that the regulatory provisions of the Willey Act are superseded by the Taft-Hartley Law as to the contracting parties and the individual plaintiffs herein.”

Now, may it please the Court, it is an unfortunate situation in the case before the Court that certain matters of pleading occur because essentially here is where we are. It occurs to the petitioners in this matter that perhaps we have been confused in our reasoning, for this reason, that [240] obviously, if the complaint is read carefully, there were certain allegations therein which indicated facts constituting an unfair labor practice under the Taft-Hartley law, just as there was in this New Hampshire case. In other words, these people had a contract which provided for a closed shop and which, according to the statement of fact, would have constituted an unfair labor practice under the Labor Management Act of 1947, but those allegations were contained in the petitioner's complaint for two reasons, not to allege an unfair labor practice, but (1) to indicate certain threatened alleged acts tending to the conclusion of irreparable injury upon which we sought to obtain a preliminary restraining order; (2), to show the serious nature of a substantial, actual, right controversy, which the Court would be authorized, under the declaratory judgment act, to decide. Now that being the case, essentially this is the situation from the complaint: We are not endeavoring to prohibit or to prevent an unfair labor practice. We are not

endeavoring, at this stage of the proceeding, because the Court has already said that the Norris-LaGuardia Act has taken away its authority to award ancillary injunctive relief. We are now arguing our complaint upon the merits, as to the question of the Court's jurisdiction, and what are we asking for when all these other ancillary matters are deleted from our consideration? We are doing just as they did in the New Hampshire case, we are asking whether or not, by reason of the allegations [241] concerning the activities of this industry in interstate commerce, whether that makes the Labor Management Relations Act of 1947 applicable or whether it is not applicable. Now that is the point.

Now this matter of declaratory judgment was really never properly gone into by any court at length until the decision of Justice Hughes in *Aetna Life Insurance Company of Hartford, Connecticut, vs. Edwin P. Haworth and others*. It was decided in 1947, March 1st. The citation is 300 U. S. 227, and there is some very clear doctrine in that case as to just exactly—I am reading now from Law Ed. page 620. In this case Haworth had some insurance policies with the insurance company, I think about five of them, and some of the provisions of the insurance policies provided, in effect, that in the event Haworth were to suffer permanent and total disability that he would no longer be required to pay premiums and that the policies would be paid to the beneficiary upon his death. That matter was a controversy, a dispute. He had refused to pay the premiums. The

insurance company had written back several times and told him that they considered the policies lapsed because of non-payment of premiums and in the complaint they set up that if the policies were still in force and effect, the company would have to maintain a legal reserve of twenty thousand dollars and that while no injury had occurred as yet, that was such a type of controversy [242] that could be adjudicated and the rights determined under the declaratory judgment act. The court said:

“The complaint asks for a decree that the four policies be declared to be null and void by reason of lapse for non-payment of premiums and that the obligation upon the remaining policy be held to consist solely in the duty to pay the sum of \$45 upon the death of the insured, and for such further relief as the exigencies of the case may require.”

Now:

“The Constitution limits the exercise of the judicial power to ‘cases’ and ‘controversies.’ ‘The term ‘controversies,’ if distinguishable at all from ‘cases,’ is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.’ Per Mr. Justice Field in *Re Pacific R. Commission*, * * * 32 F. 241, 255. (Citing case.) The Declaratory Judgment Act of 1934, in its limitation to ‘cases of actual controversy,’ manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word ‘actual’ is one of emphasis rather than of defini-

tion. Thus the operation of the Declaratory Judgment Act is procedural [243] only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. (Citing cases.) Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution 'did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.' (Citing cases.) In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of Congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends."

Now:

"A 'controversy' in this sense must be one that is appropriate for judicial determination. (Citing cases.) A justiciable controversy is thus distinguished from a difference or dispute of a [244] hypothetical or abstract character; from one that is academic or moot. (Citing cases.) The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. (Citing cases.) It must be a real and sub-

stantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”

Citing a long list of federal cases.

“Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. (Citing cases.) And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required.” (Citing cases.)

“With these principles governing the application of the Declaratory Judgment Act, we turn to the nature of the controversy, the relation and interests of the parties, and the relief sought in the [245] instant case.”

And then there was an objection argued extensively in that case by the other side, to the effect that the declaratory judgment act only provides for those kind of cases where the facts are not disputed, but it has been definitely pointed out by the second proposition in this Aetna Life Insurance case:

“There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations aris-

ing from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract."

Then they go on to say, on page 622, in the middle of the right-hand column:

"That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is everyday practice. Equally unavailing is respondent's contention that the dispute relates to the existence of a 'mutable fact' and a 'changeable condition—the state of the insured's health.' The insured asserted a total and permanent disability occurring prior to October, 1930, * * *" etc. [246]

The declaratory judgment business, by virtue of Rule 57, can be summed up in this way: The declaratory judgment is essentially one of construction. The declaratory remedy is cumulative and alternative, not exclusive. Federal Rule 57 so provides. Existence of another adequate remedy does not preclude judgment for advisory relief in cases where it is appropriate. To the same effect in Section 1 of the Uniform Act. By the same token, this form of relief does not supersede federal type of remedy. It is supplemental and does not supersede. It is supplemental to existing remedies.

Now there is a very important thing that we would like to suggest to the court, which I think has been suggested by Mr. McCarthy, which is not true at all, in our judgment, and that is that

his contention, may it please the Court, in applying the *Gerry of California* case is not applicable here because in that case it was sought in the California courts by injunctive processes to restrain certain acts of the union, as I recall it, which were denominated as unfair labor practices but which were not unfair labor practices under the California Supreme Court decisions, particularly the *Hot Cargo Act*. The inference of his argument to the Court would be this, that this declaratory judgment remedy is applied by the federal district court sitting in equity or otherwise, but let me point out this in that respect—I am [247] now reading from Mr. Duvall's article in Vol. 34 *The American Bar Journal*, No. 5, May, 1948, from page 381, starting on page 380, the last sentence:

“In this connection, it should be remembered that the declaratory action may be invoked in two types of situations: First, those where no other remedy is available, e. g. where plaintiff seeks a construction of a contract before its breach; and second, where plaintiff desires a determination of another's right to build a certain type of structure under plat restrictions, he could bring either a declaratory action or one for an injunction.

“The declaratory action is a special form of action—*sui generis*. It is neither legal nor equitable, but takes on the color of either, depending upon the nature of the particular facts and controversy involved. In view of the abolition in the federal Courts and most State Courts of the distinction between law and equity actions, exactly the same considerations determine the right to a trial by

jury in the declaratory action as in any other type of case.

“No substantive rights or jurisdictional factors are within the scope of the declaratory Acts, which are entirely procedural. Therefore, the jurisdiction [248] of the Courts in actions thereunder is no greater or different than in the coercive form of action.”

Then he goes on as to the requisites. The first requisite:

“There must be a justifiable controversy; that is, a controversy ‘that is appropriate for judicial determination’; one that is not of ‘hypothetical or abstract character’ or that is ‘academic or moot.’

“2. The controversy must be between parties whose interests are adverse.

“3. There must be a tangible legal interest in the controversy by the party asserting it.

“4. The issue presented must be ripe for adjudication.”

Now I observe that one of the allegations of the various motions filed by the Board and respective counsel is that the complaint does not state facts sufficient to indicate an actual controversy. That matter has not been presented as yet because it would seem that the matter of jurisdiction must be determined before we go to that other objection. It is conceded, may it please the Court, that prior to the amendment of the National Labor Relations Act of 1935 that Congress made the National Labor Relations Board exclusive in respect to [249] jurisdiction in respect to the prevention of unfair labor practices, and we concede the point, may it please

the Court, that if we were to invoke the remedies provided for under the Taft-Hartley Act, that we would have to proceed by filing a complaint with the Board in the proper case and that then the Board would proceed with its administrative procedure of making an investigation, perhaps have a trial examiner of the matter.

The Court: Let me ask you a question, have you brought such? Wouldn't the Board investigate its jurisdiction?

Mr. Brown: Well, of course, your Honor, that is absolutely a correct statement because——

The Court (interrupting): Suppose it went further and did investigate this jurisdiction and found that the particular labor organization or employer was not engaged in, or in fact he had anything to do which affected interstate commerce, then the Board would decline to act further and then the complainant could have remedy in the Circuit Court of Appeals.

Mr. Brown: Right. That is correct, but if I may suggest, because I think I know what is bothering the Court in respect to that matter, and that is simply this: When you analyze our complaint, as the matter now stands, we are not alleging an unfair labor practice; that is, we did at the beginning of this thing, but your Honor has determined that [250] matter. That is behind us. The only matter now that is essential in this complaint is the proposition that we are trying to bargain with these people and we must take the allegations of the complaint to be true upon a motion of this kind, and that the bargaining has broken down because of

the controversy, to-wit: are we under the federal act or are we under State legislation? What could we petition the Board for, may it please the Court? The only thing, as we stand before your Honor now, that we are asking for—are we covered by the federal act or the State? The Board would say, just like Mr. Denham said, they would say, “Well, Section 10(a) gives the Board power as hereinafter provided” to do what? To prevent any person from engaging in any unfair labor practices listed in Section 8.

The Court: Do you mind if I interrupt you again? I don't want to interfere with the trend of your argument. Suppose the practice that you have indulged in in this action became quite common. It would be possible that you would have in every judicial district in the United States one or a great many cases of the same character, depending upon the extent of the population of the different places. One judge in Los Angeles might decide under a certain set of facts the Taft-Hartley law did not apply. Another judge in Los Angeles United States Court, under the same set of facts might decide that it did apply. Your Ninth Circuit Court of Appeals would be [251] deluged with appeals and that would be the situation all over the United States. Now that is the thought I have right now. Maybe that is the reason why Congress has set up the National Labor Relations Board an administrative body to determine that question, among other matters. I do not believe there is any question but what the National Labor Relations Board has the power to determine whether or not a cer-

tain labor organization is or is not engaged in an industry or practice affecting or having to do with interstate commerce. All right. If that is the situation, an administrative authority given an administrative body created by Congress for a purpose, I do not mind telling you now that if that is the situation, my views are that that administration should be drained first.

Mr. Brown: I appreciate that, your Honor. But if I may be permitted—if we were coming in here at this stage of the game—I want to confess ignorance on the applicability of the Norris-La-Guardia Act when I appeared before the Court before—in other words, if we were asking additional remedies, if we were in here to seek some other remedy through either injunction other than damages, as authorized by 303(a) of the Taft-Hartley Act, then we would have come under Section 10 (a) of the Act, and that limits the powers or the jurisdiction of the Board, and what does it do:

“The Board is empowered, as hereinafter [252] provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power will not be affected——”

The Court (interrupting): You might stop right there. I want to get this thing right, whether it is favorable to your side or the other. Now read that last statement that you made from that section.

Mr. Brown: This is Section 10(a):

“The Board is empowered, as hereinafter provided, to prevent any person from engaging in

any unfair labor practice (listed in Section 8) affecting Commerce.”

The Court: Right there—so it appears necessary for the Board, and the Board has ample power, to determine whether any practice affects interstate commerce.

Mr. Brown: That is right.

The Court: And the Board would have ample power to determine whether any organization, individual, group, labor employer or employee, in its practices or in its industry or activities, and so on, affects interstate commerce.

Mr. Brown: Correct, your Honor, but may I answer this. Paragraph (b) of Section 10 provides as follows:

“Whenever it is charged that any person [253] has engaged in or is engaging in any unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *.”

And then it goes on as to how they carry out those procedures, the fact that the Board is empowered to petition for a restraining order. We, may it please the Court, are not asking or charging

the unions with an unfair labor practice. We want to prevent an unfair labor practice by carrying out the very purpose of the federal declaratory judgment act to determine, are we under this set of rules or that set of rules, so that we will not be, nor the respondents, subjected in any way to the penalties that accrue by reason of a violation. There are damage responsibilities provided upon employers and unions, criminal offenses and imprisonment provision in the Taft-Hartley Act, and all the rest of it. Now the only purpose of a declaratory judgment act is to permit suits, not only of a contract, but [254] the right and title of persons and their properties to be determined before a wrong has arisen. For example, before 1934, unless there was a wrong committed, the United States Supreme Court said, "Well, that is merely academic and there is nothing we can do about it," but under the declaratory judgment act, and as pointed out in that Aetna case, the very purpose of the thing is to have these rights determined before, not after, there has been a breach thereof and for the purpose of determining that before the injury has accrued.

Declaratory Judgment, 16 American Juris, 296, points out:

"Declaratory judgment proceedings have frequently been employed to determine questions as to the construction or validity of statutes, ordinances, and other governmental regulations. The Uniform Act expressly enumerates these questions among those which may be determined thereunder, and other declaratory judgments acts contain sim-

ilar provisions. Moreover, there is authority to the effect that declaratory judgments upon these questions may be rendered even though the statute applicable does not so provide in express terms. Thus, the Federal Declaratory Judgments Act, although it does not mention declarations as to the construction or validity of statutes, has been invoked [255] frequently as a means of assaying the constitutionality of congressional legislation. If, however, an act authorizing declaratory judgments can not be reasonably construed as empowering the court to determine thereunder the validity of a statute or ordinance, it is not likely that any court will assume such authority."

I am going to close now, because I have taken a lot of time, but there is one thought I would like to leave with the Court after we leave.

The Court: I wish you would summarize just what is it you want the Court to do in this case.

Mr. Brown: We want the Court to say something in reference to the operation of this industry wherein the respondents are employed and the employer's conduct to determine whether or not, by the nature of its business activity, it so affects commerce, or is engaged in interstate commerce, so as to fall within the category of industry and operations covered by the Taft-Hartley Act. If the Court so finds, we ask the Court for a declaratory judgment, just as we found in this New Hampshire case that the Labor Management Relations Act of 1947 applies. Then these folks can go on with their bargaining. We are not interested in any unfair labor practices. We can not ask the

National Labor Relations Board [256] that question. The only thing we can ask them is under a complaint charging an unfair labor practice. We recognize our folks as being decent people, we recognize them as being the proper representatives of their members, we want to bargain with them, but neither side know where they stand. We are not charging them at this stage of the game with an unfair labor practice; we wouldn't do it, we couldn't do it.

The Court: Well, is it contemplated now that there is to be or will be a strike as the result of negotiations that may be in conflict with the Taft-Hartley law?

Mr. Brown: At the present time, your Honor—now I am speaking for the record, insofar as the pleadings are concerned, because the Court might as well have that information—in view of the fact that the Court decided that its jurisdiction was limited by the Norris-LaGuardia Act, couldn't continue the status quo further than hearing on the motion for temporary order, naturally as alleged in that complaint, the master contract of May 21, 1948, expired. These people have been going along since that time under certain stipulations, but they have been unable to draft a formal collective bargaining contract because they do not know whether they are under the Taft-Hartley Act or the State law, and if they assume that they are not under the Taft-Hartley Act and they did enter into a contract which has provisions that are different than those permitted by the federal act, then everybody, [257] employer and employee, agents, and

everybody, are then, may it please the Court, subject to certain penalties under the Act. If it can be determined that they are either under or not under the Taft-Hartley Act in this proceeding, then those gentlemen will go about their business and complete the other provisions of the contract to square with the rules under which act they are governed. Now that is all in the world we want. We could not ask the National Labor Relations Board that question, are we under the Taft-Hartley Act? Mr. Denham or Mr. Penfield would come back and say "that is a hypothetical question, asking for legal opinion, there is nothing before the Board under its jurisdiction as prescribed in Section 10(b). However, if you people do come along and you make a contract which you believe constitutes an unfair labor practice and you want to sign a verified complaint before the Board, then we will proceed in the usual course" and the very purpose of a declaratory judgment is to determine, for example, the constitutionality of the statute or ordinance before somebody breaches it and gets himself in difficulty. We are not asking for an interpretation of whether the facts alleged in the complaint constitute an unfair labor practice. We do not care. That state of this proceeding has disintegrated in the past. I think your Honor has our theory. You may not agree with it but I have tried to present it as I see it.

The Court: I do not know whether I do or not. [258]

Mr. McCarthy: May it please the Court, directing the Court's attention to the Riley case, there is

no possible way in which the complaint in this action can be changed into a Riley case one. The Riley case is the case decided by the Supreme Court of New Hampshire, to which counsel has referred. In this case the union, as in the case before your Honor, were saying, "We are not under this Act." Precisely it means, "You are not engaged in business under the contract which affects interstate commerce." That is the position which the employer says in his complaint this union takes. The employer says: "No, you are under the act. We are engaged in business in which a labor dispute would affect interstate commerce; therefore we are under the act and you must behave accordingly." They argue the Riley case. In the Riley case both the union and the employer conceded that they were wholly engaged in interstate commerce. The factual issue which the Board has to decide, namely, affecting interstate commerce, that factual issue which exists in the case before your Honor, was conceded in the Riley case. The court said:

"It is the position of the petitioners that the Labor Management Relations Act of 1947, 29 U.S.C.A., Sec. 141 et seq., supersedes the provisions of Laws of 1947, Chapter 195, so far as the provisions thereof are applicable to the business engaged in by your petitioners and the defendant Joseph [259] E. Faltin, which is conceded to be wholly interstate commerce, * * *"

In other words, in the Riley case the union and the employer said to the court: "This business is in interstate commerce. We have a State act and the Supreme Court has the federal act. We have a

State act which says you can only have a union shop under this condition, that condition and the other condition. We have the Labor Management Relations Act, which says you can have a union shop under different conditions provided for by the State constitution where we are in interstate commerce. We have conceded that as an admitted fact, so please tell us if we are in interstate commerce whether the State act supersedes the federal act or the federal act supersedes the State act," which was a very simple proposition. The court there simply said, "If you are in interstate commerce, as you agree, obviously the federal act applies." What is our situation here? Our situation here is that the union says we are not in interstate commerce and counsel just said that one of the things they wanted to do was put evidence in here through witnesses to prove that the union is wrong, so it is not a question of asking your Honor whether the laws of the State of Nevada apply or the federal act, it is a question of asking your Honor to make a basic decision that the Board has to make, and in that respect it is best to go back to the statute, even if it takes just a little while, and get this thing clear once [260] and for all, because counsel has ignored one feature of the Board. The Board not only hears unfair labor practices cases but holds elections. One of the allegations in this complaint is that this union will not agree to have the Board hold an election in order to determine whether or not it can have union security clause, and the charge is definite in the complaint. The union says we won't agree to that because we are not in commerce, we do not affect commerce; at

least, that is the allegation of the complaint. It is not of any moment what the truth is, that is the complaint. So what happens? We go to Section 9(a) of the Act. You will find it, your Honor, at page 102 of that pamphlet which I think your Honor has there, the little green-covered pamphlet: Section 9(a) says:

“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, * * *”

I want your Honor to remember those words—
“in a unit appropriate for such purposes”:

“* * * shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *”

So first you have to have this representative not only represent a majority, but it must represent a majority in a unit. All right. Now when we come to the question of unit, now in [261] Section 9(b):

“The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *”

So now the Board must make a determination as to whether these unions should bargain with this plaintiff employer association or with the employers individually, and the Board has to make that decision. That is the unit. Nobody else can make it but the Board. They then say:

“* * * Provided, That the Board shall not (1) decide that any unit is appropriate for such pur-

poses if such unit includes both professional employees and employees who are not professional employees, unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce [262] against employees and other persons rules to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

So in other words, the Board's power to determine the unit is limited. Now if the union says, "We take guards into membership" and bargains for the guards, to that extent the Board itself would have to limit that union's power under this section.

Now following that what happens?

"Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board——"

Now who can file this petition?

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of

employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified [263] or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a); * * *

Then the next one:

“(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); * * *

Alleging that various claims are made. What happens when that is done?

“* * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.”

Now what is “affecting commerce”? The definition of that is in the Act and it is very simple:

“The term ‘affecting commerce’ means in commerce, or burdening or abstracting commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”

In other words, this Board, before it can even hold a hearing to determine what the unit is, whether there should be an election, must first find whether or not a labor dispute between those parties would burden commerce. [264]

Now why have I gone to such length there? I have for this reason—this complaint alleges that this union will not have a vote on the question of its right to enter into a union shop contract. Now the union alone can petition for that vote. The employer can not. Here on page 104, sub-section (e):

“Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), * * *”

You recall, your Honor, that I mentioned 9(a) in the unit:

“* * * of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes * * *”

Now we have the union again. In other words, the union must file a petition claiming that thirty per cent of the employees in an appropriate unit want a union shop. Otherwise you can't get an election, but the Board has no authority to find an appropriate unit unless a dispute in that unit would affect interstate commerce, and then in addition it must decide whether that unit is one employer or many employers, so that just take what would happen, assuming that your Honor should make a ruling to the effect that these people are engaged in a business in which a labor dispute would obstruct commerce and therefore the National Labor Relations Act applies. This union sits down and says, “Thanks, we won't [265] file any petition. We are not going to ask the Board for a union shop election. We are just not going to do anything.” So what happens? It is a nullity and it has never been a practice in district courts of the United

States to do useless acts. It is an absolute nullity because the union has within its power, under this Act, the right to file that petition or refuse to file it. There is nothing in here that requires the union to file it. Unless the union can persuade thirty per cent of the men working in the shop to sign a card individually authorizing the union, they can't even file the petition, and that is in the Act itself:

“Upon the filing with the Board by a labor organization, which is the representative of employees as provided in Section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.”

And the proper showing—Mr. Penfield will confirm my statement— [266] is a written signed document by the individual man, saying that he desires to have his union authorized to write a union shop. If thirty per cent of the people refuse to sign it, the union could not even file the petition, so a completely useless act is the net result, because your Honor could not order this union to coerce these men into signing those cards, because that is an unfair labor practice. Those men must sign those

cards freely and voluntarily and of their own free will and if there is any coercion by the union you would have an unfair labor practice. It is forbidden by the Act. Now that being the case, the act that your Honor is being asked to do would be a complete nullity.

But let us take the other practice that has been discussed. I do not think there is any appeal to any court from the Board's decision on the question of a union shop election. There is no appeal provided for in the Act. That is a final, permanent administrative decision. The only way you can appeal that is to bring an unfair labor practice charge, based upon some act done as a result of the Board's action. In other words, if the Board said, "We will not hold the election because you do not affect commerce," there is no appeal from that decision. The employer, however, or the union, could charge an unfair labor practice. That record would become a part of the record of the unfair labor practice action and it is then appealable to the Circuit Court, but on [267] the question of this union shop election there is no appeal, so what can happen is this—your Honor could find they are under the Act, order an election, the Board says "We won't have it," and the Board has the last say and there is no appeal from it. Obviously this decision here could not be pleaded as *res adjudicata* before the Board. It has the right to make its own decision. Who has rights under unfair labor charge? The employer has rights to file it, the individual employee has rights, and the union has a right. Now when an unfair labor practice charge is filed and the Board

decides it has not been committed or it has no jurisdiction and that decision is sustained by the Circuit Court or the Supreme Court, if necessary, that decision is *res adjudicata* as to the rights of employer, employees individually, and the union. No decision by this Court is going to be binding upon the individual man who may, if he wishes, file an unfair labor practice charge in his own right under this Act and ask for relief as an individual, because he is not before your Honor. He just isn't here. And secondly, even under counsel's theory, you couldn't do it, so what we have here is this—the Complaint recites very clearly that this union has refused to bargain in good faith, because it insisted upon the inclusion of a union shop clause, which employer says they are not entitled to have unless they hold an election, but which the union says they do not need an election because they [268] are not in an industry in which a labor dispute will adversely affect interstate commerce, so they are in here asking your Honor to determine the basic question of the Board's jurisdiction. The Board, as your Honor can see from the sections we have referred to, has no jurisdiction unless there are reasonable grounds to believe that a labor dispute would adversely affect interstate commerce. Now in the *Riley* case the parties conceded that a labor dispute would adversely affect interstate commerce. They said the business was in interstate commerce and "we want to know therefore whether the State act or the federal act applies." Now take counsel's request—"are we covered by the federal act or a State act?" I think your Honor can an-

swer it, but I do not think it is going to be beneficial to the parties. Your Honor can say: "If the petitioner in this case and the employers the petitioner represents, are engaged in a business in which a labor dispute would substantially and adversely affect interstate commerce within the meaning of the Labor Management Relations Act, then you are subject to it, but if you are not engaged in such business, then you are subject to the State law. The determination of that question of fact has by Congress been placed in the National Labor Relations Board.

Mr. Brown: Excuse me, your Honor, but may I ask through the court, the last statement of counsel, by what right Congress has exclusive power to authorize the National [269] Labor Relations Board to determine that?

Mr. McCarthy: Under Section 9(e), page 104, a union shop election can only be held in an appropriate unit. By Section 9(c), the board shall determine the appropriate unit only when a question of representation affecting commerce exists. So, therefore, they must determine whether a question affecting commerce exists. Affecting commerce is defined by the Act to be:

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

So, therefore, the Board must hold a hearing and find out whether or not a labor dispute will affect commerce if it occurs in this industry, before it

can determine the unit, and it must determine the unit before it can order a union shop election, so it essentially has to determine whether or not it obstructs or will affect commerce. In addition to that, the Board must also decide whether or not communist affidavits have been filed and whether or not other reports have been filed, and if they have not been filed, the Board has no authority to direct the holding of a union shop election. None at all. It is without jurisdiction. Now here is what it says: [270]

“No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed * * *” and so on and so forth. So they would ask your Honor to determine a question which Congress has said not even the Board can determine unless these affidavits are on file, and there is no allegation in the complaint that these affidavits required by Congress have been filed by these unions, or these reports have been made and it is immaterial whether they have or they haven’t. We have to rely on the complaint.

Now in addition to that, what has been the right of Congress to enact this legislation at all? Congress can only enact legislation of this sort in the exercise of its commerce power. It is not incumbent

upon Congress to decide, but Congress came very close to that. They made a statement of policy at the very beginning of this act, at page 95:

“Industrial strift which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another’s legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

“It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.”

The Court: May I ask you a question? Suppose a contract is negotiated between one or all of the [272] unions involved in this case, providing for a closed shop, and the contention of the plaintiffs—

I don't know how they would make such a contract if they felt it was illegal——

Mr. McCarthy: I will put it this way—if demand was made upon plaintiffs to enter into that agreement but refused, and the union went on strike, the National Labor Relations Board says they come to the Board, that the Board makes an investigation, if the Board has reasonable grounds to believe that this is in violation of the Act, the Board is entitled to come into this court and get an injunction and proceed against it.

The Court: Here might be one of Mr. Brown's ideas. Suppose representatives of both sides, employers and unions, were ready to sit down and stipulate and execute a contract. Suppose the employers here were willing and anxious to enter into a contract that would provide for a closed shop. They are not disposed at all to refuse to agree to a closed shop. Now aren't they in a position where they might be fearful they might be violating some term of the Taft-Hartley law?

Mr. McCarthy: That is absolutely true. That is their position, but isn't it true they may be fearful of it and if they entered into the agreement and if, in fact, it was a violation, both the union and the employer would be responsible [273] to any individual employee who was guilty by reason of that agreement. In other words, if a man was told he had to get off the job because you are not a member of the union——

The Court: Would that leave the contracting parties, employee, the employer and labor organi-

zation, or either one of them, subject to an action for damages?

Mr. McCarthy: Yes, your Honor, no question, an action for damages subject to a proceeding before the Board, but the employer does not get into that position because he says, "I won't sign the agreement." That is his right.

The Court: Yes, but we don't know whether he is going to or not.

Mr. McCarthy: If he says, "I won't sign it"—

The Court: Are we in this position, Mr. McCarthy, here—at the outset we have no indication from this complaint, or any utterance of the employers, that they will refuse to sign a closed shop contract.

Mr. McCarthy: I am sorry, sir, we have the complaint which clearly states that is what brought on this issue, that the employer has refused. They go into it in detail.

Mr. Brown: Only on the basis we would be liable, if we did it——

Mr. McCarthy: Paragraph V, page 6, they recited in detail:

"That it was the opinion of the Reno Employers [274] Council after advice given by legal counsel, that the Labor Management Relations Act of 1947 prevented the continuation of the master agreement beyond May 21, 1948, without a revision of the union security provision of said contract as required by said Labor Management Relations Act of 1947. Whereupon petitioner did notify the unions and the Council, respondents herein, that in its opinion the respective unions should immediately

take steps to comply with the Labor Management Relations Act of 1947 by filing the necessary petitions so that proper elections should be held prior to May 21, 1948, for the purpose of securing proper authority to request union security provision in their working agreement. That thereafter and during said negotiations your petitioner took the position in such negotiations that the master agreement could not be continued after the date, May 21, 1948, without compliance with Section 8 A I of the Labor Management Relations Act of 1947, the same being Chapter 120, Public Law 101, which requires an election and affirmative vote of the employees on the question whether union membership be made a condition of employment.”

Then it goes on:

“* * * but that it was their belief * * *” [275]
meaning the Building Trades Council:

“* * * that the Reno Building Trades Council and the construction industry in the area of California and Nevada aforesaid was not covered by the provisions of said Act * * *”

That issue was squarely put up to the employer and according to the Act what the employer is supposed to do, instead of coming in here prior to the 21st, was to have gone to Mr. Penfield's office and charged these unions with an unfair labor practice and if there is no question that affects interstate commerce, the Board then is given by Congress power to come in and obtain an injunction until the Board decides the entire matter, and

that is specifically provided for in the Act and that is why we say there has been no exhaustion of their——

The Court (interrupting): Read that statement again. We have the statement in the complaint that in the opinion of the Reno Employers Council that the Labor Management Relations Act prevented the continuation of the closed shop agreement. That is what it means.

Mr. McCarthy: The union said, “No, it didn’t and you sign a closed shop agreement or we will strike,” that is what the complaint says.

The Court: Before that strike took place, would there be any relief that the employers could obtain under [276] the Taft-Hartley law?

Mr. McCarthy: Very definitely, and here it is, your Honor. In fact, it is one of the provisions of the Taft-Hartley law the unions dislike very strenuously. Here it is:

“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.”

The Court: The act of the unions in declaring that unless there was a closed shop contract they would strike, that would be an unfair labor practice.

Mr. McCarthy: No question about that. Union unfair labor practice:

“It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this para-

graph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

“(2) to cause or attempt to cause an employer to [277] discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

“(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a):

“(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing [278] or requiring any other

employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * *"

Mr. Penfield: Pardon the interruption. To assist your Honor I might add that was exactly the issue in the case now pending before the Board which involves John L. Lewis and his Mine Workers. John L. Lewis was insisting that they sign the provisional closed shop agreement. The employers took the position that because of the Taft-Hartley Act they could not sign it, they were prohibited from doing so. Lewis refused to give on that position and the employers charged Lewis with seeking to impose an illegal condition on bargaining and attempting to cause them, the employers, to discriminate against employees by signing such agreement. The Board issued a complaint charging Lewis, went into the district court and sought injunction against a strike, which was issued by Judge Goldsborough, although later the judge got the parties together and they did sign an agreement, the [279] understanding being this was a new field of law, maybe not entirely clear as to whether these things were or were not violations and therefore it would be carried on through these states, so it was decided by competent court. That is in the process

of being done. The Board has held a hearing, but that is the way when an issue comes up it is gotten before the Board.

The Court: Then in this case here if the employers were fearful of entering into a closed shop contract, the unions insisted upon it and strike was impending or threatened, the employer here could file a complaint with the National Labor Relations Board, alleging an unfair labor practice and then if the unions wanted to meet that issue on the question of jurisdiction, they could come in and say that they were not engaged in any industry affecting interstate commerce.

Mr. Penfield: That would be the first thing that we consider. If our ruling was no, that would end the proposition right there.

The Court: That may be said to be your thought in regard to this particular case?

Mr. Penfield: That is correct.

Mr. McCarthy: I might add, your Honor may have read the decision with respect to the hiring laws in the Atlantic case. There the employer said, "We won't sign the [280] contract." The Board got an injunction restraining the men from striking and went on to consider that the hiring laws were improper. The matter is before the court but injunction is still in effect.

Mr. Penfield: Correction. They did not get an injunction. The Board did not get an injunction. That was the other one which comes up under the emergency provisions. However, the matter was rejected. The Board has now issued its decision. It

is now going on up through the Circuit Court. We are at the present time engaged in a trial on the same issue, on hiring laws, in San Francisco.

Mr. McCarthy: The Act specifies, at page 108:

“The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall [281] have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.”

Then they say following that subdivision (1) section, which has to do with jurisdictional disputes:

“Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. * * *”

And that is this. This is one of those charges:

“* * * If, after such investigation, the officer or regional attorney to whom the matter may be re-

ferred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunction relief pending the final [282] adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of the law."

In other words, it wipes out the Norris-La-Guardia Act insofar as the use of this power is concerned. As a matter of fact, in section (h) they did not take any chances. They said:

"When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932."

And that was done and the reason for it is obvious. It was to take out of the hands of private litigants the enforcement of a public act, which is the basis of the Gerry case and the rest of it. In

other words, the Board in this case acts very much as a district attorney does. You come in, make your complaint, [283] it goes to the grand jury, and the man is indicted. Here you come in, make your complaint, the Board investigates it, if it has reasonable cause to believe—this same test the grand jury gives—that an unfair labor practice has been committed or is about to be committed, it goes into the district court, and incidentally in that case the court does not have to find any of these jurisdictional facts in issue here. All the court has to find is that the Board had reasonable cause to believe that commerce would be affected and the very last case that is the exact finding which is made by the district court in Illinois. In that case the United Packing House Workers of America against Wilson, 2297, decided May 11, 1948, this is exactly the finding:

“The act expressly confers jurisdiction in Section 10(j) to grant temporary injunctions upon application of the Board, after the latter has issued a complaint charging an unfair labor practice.”

This was the case in which they held that they did not have jurisdiction at the suit of a private individual, but there is one other thing here in which—I thought I brought it over here and I wanted to read it—no, I didn’t bring it over—in which they make the direct finding that the Board had reasonable cause to believe rather than making a finding of fact that they were engaged in interstate commerce, or that the dispute would affect it.

So that, insofar as jurisdiction is concerned, the situation is this: Your Honor, I think, can clearly

see the unholy mess that we would all be in if an administrative board, from which under certain circumstances there is no appeal, should decide one way and the district court should decide another way an the administrative board, which under certain circumstances can get injunctions or refuse to get injunctions, because let us trace exactly what can happen. Your Honor declares, we will say, as counsel has requested, and says these unions are engaged in a business which affects interstate commerce. We will say that you should make such a finding. Therefore, as a conclusion of law, they are subject to the Labor Management Relations Act. What kind of a judgment is your Honor going to enter, going to direct us to do something? No, just going to advise us. Right now we have been advised. We sit back and do nothing. We say, "Thank you very much." What happens? We say, "Mr. Employer, either you write a closed shop contract or you do not get any work done," so what does the employer do? He has to go to the National Labor Relations Board and your Honor's finding is of no moment, means nothing. So the Board makes an investigation and it says, "In the first place, Mr. Employer, your unit is wrong. We can't accept your charge because you want to deal with this union in this fashion [285] and it is making the demand in the other fashion and the unit in which it is making the demand is the appropriate unit. You have no charge. We haven't committed a wrong because we have to make the demand in the appropriate unit, so there is nothing happens to that one.

Then again the Board makes an investigation and comes to the conclusion that interstate commerce is not affected substantially so as to bring the act into play, and incidentally, this is one such finding by a trial examiner recently, so the Board says, "No, no unfair labor practice," so we continue to strike the job, in the face of a finding that we are under the act.

Now fundamentally the Supreme Court, in the *Wagshal* case, went way out of its way—it is in the brief submitted by the government—but the important thing in that case is that it is not often that the United States Supreme Court deliberately goes out of its way, to use a colloquialism, to "touch off the dynamite" and state as to what it thinks is the proper thing to do under certain circumstances, but they did it in that case, and it is very easy to see why they did it. In the *Wagshal* case the court said this:

"A preliminary claim must be met, that the case has become moot. The short answer to the argument that the Labor Management Relations Act of 1947, 61 Stat. 136, 149, Sec. 10(h), has removed the limitations of the Norris-LaGuardia Act upon the [286] power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where the proceedings are instituted by a private party."

Now when the Supreme Court went out of its way to make that statement, I have no doubt it was the primary factor that influenced the Supreme

Court of the State of California in the Gerry case and fundamentally in that case all they decided was that the suit of a private party would have no power and jurisdictionally that is the only conclusion we can come to.

Mr. Griswold: May it please the Court, may I make just a little different statement of facts. Let us say that your Honor should give what the petitioners ask, that is a determination of the question of whether this is interstate or intra-state commerce. First, it would have to be done after lengthy hearings on the character of each of the crafts and the contractors, because both the character of the contractor and the crafts enters into it. Now after that was done, let us say in place of saying that we want a closed shop, let the unions or the employers say, "Well, we are perfectly satisfied with conditions as they are. We do not want anything." We have what they denominate a stipulation that I have tried several times this morning to get in here—they say a stipulation, which I say is a contract, and it has all [287] the terms of a contract, in that wages and hours, working conditions and termination period of one year up to next May is in this contract. So they simply say, the unions say, "There is nothing we want done. Thank you, your Honor, that is the decision, but we are not interested in it." So it goes along to next year. The same question comes up. Let us say that at that time there has been some determination of it by other courts, so the unions call upon the employer for a closed shop. At that time the employer comes

into the National Labor Relations Board on an unfair labor practice, and that is the only place he can come. The National Labor Relations Board then, through its machinery, immediately makes the investigation as has been outlined by counsel and they come to various and other opinions in contrast to what your Honor has done. Now declaratory judgments do not act as advice or in an advisory capacity. There must be a legal right before the court can have jurisdiction and a legal right that can be determined. Now, your Honor, I can not see where any decision that might be given it would make one iota of difference, insofar as the relief of the parties are concerned in the event either party determined to go to the National Labor Relations Board. Either party could go. So I see no reason for your Honor just writing an opinion, a decision, in this matter, where the proper tribunal, and the tribunal that just have the jurisdiction and retains and maintains that [288] jurisdiction to hear these matters before your Honor can step in is the National Labor Relations Board. So there is no use doing a thing in this matter. Let us go into the proper administrative tribunal,—they will handle this—that we can get our teeth into.

Mr. Brown: May it please the Court, I know the time is getting late. We have cited here a large number of cases—this Bakery Drivers case, the Gerry of California case read at length, all by Mr. McCarthy this morning. Only one of those cases, may it please the Court, indicated that in view of the Norris-LaGuardia Act private parties have no

right to go into court and obtain an injunction, and why is that? That is because of another act of Congress, the Norris-LaGuardia act, which restricts the jurisdiction of federal courts in the matter of injunctive remedies except in certain instances. Now prior to the amendment of the Wagner Act, the Supreme Court of the United States held that insofar as it prevents unfair labor practices, the Board had exclusive jurisdiction. Now how was that matter presented to the federal courts? It was presented in view of that exclusive provision in section 10 of the old Wagner Act, saying the Board had exclusive jurisdiction, it was presented to the Courts of the United States through application for injunctive relief. Now when the act was amended in 1947 by the Taft-Hartley Act, it provided in addition that the Board is empowered, as hereinafter provided, [289] to prevent any person from engaging in any unfair labor practice listed in section 8, affecting commerce. This reverses the old Congressional theory of section 10, because the new Congress, the 80th Congress, added this:

“This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise;—”

Now in that same section, where the Board is given power to seek out injunctions, we find in section 10(h) in the Taft-Hartley Act expressly uses this language:

“When granting appropriate temporary relief or a restraining order, or making and entering a

decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U.S.C. Supp. VII, title 29 secs. 101-115)."

That is the Norris-LaGuardia act, but, may it please the Court, when Congress in 1947, in view of the fact that the Board had exclusive jurisdiction to prevent unfair labor practices, [290] took out the word "exclusive" and added that this power should not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise, Congress at that time knew that in 1934 the United States Congress had passed a declaratory judgment act, section 400, Title 28, and if they had intended to say that the district courts of the United States were not able to adjudicate controversies which they have adjudicated in the past under the declaratory judgment act, wouldn't apply if it simply involved a case as we find in the New Hampshire matter, we submit they would have said so, but they did not, and the reason for the amendment to Section 10(a) was to avoid and to prevent unfair labor practices by other means provided by law, which is the proposition presented to this Court, asking for declaratory judgment to prevent an unfair labor practice. If a man has a 99-year lease, having cer-

tain clauses which he feels, before he should execute that lease, should be determined and there is an actual controversy and he comes in and asks for a declaratory judgment, as we have done in State, in federal courts time and time again, then he has his rights adjudicated and the other party does in respect to that particular concrete factual situation, which enables him to prevent the necessity of damages.

Now reading from Duvall's article, just one thing:

"The concept of a government of laws and [291] not of men is a highly developed social accomplishment. The function of the judicial branch in modern society is a long step from enforcement of an individual's rights by his own might or the later trial by combat."

Then he speaks about the declaratory judgments:

"So, too, is the declaratory action a very much more civilized procedure than action for redress of violated rights. Its purpose is to provide a speedy adjudication of the legal rights, duties or status of the parties before 'dishes are broken', i.e., before there has been a breach of 'rights' or the commission of a 'wrong'."

If we know, from a decision under a declaratory judgment in this matter, that under the particular facts that ultimately arise as issue after the filing of an answer in this case by the respondents, that we are engaged in interstate commerce, or the in-

dustry as set forth in those issues affect interstate commerce as defined in the Taft-Hartley Act, then any negotiations and bargaining contracts entered into between both the union and the employers will prevent unfair labor practices and will shorten the duties, rights, and status of the parties before "the dishes are broken" and before there is a breach of rights or the commission of a wrong. Now that is our theory, may it please the Court, and we respectfully [292] suggest if the Court would desire, we would be willing, if we can be of any help, to submit additional briefs points and authorities.

The Court: This argument was addressed to the motion of the National Labor Relations Board to dismiss the complaint, the Board having heretofore been, pursuant to stipulation of the parties, permitted to intervene.

The motion is based upon the question of the Court's jurisdiction to consider the subject matter of this complaint. Three points are urged:

"(a) The amended National Labor Relations Act vests the National Labor Relations Board with exclusive initial jurisdiction of matters involving unfair labor practices.

"(b) The federal district courts do not have jurisdiction, at the suit of private parties, to determine whether the operations of employers and labor organizations affect commerce within the meaning of the amended National Labor Relations Act, to determine whether unfair labor practices within the meaning of the Act have been committed, or

to remedy, by injunction or otherwise, unfair labor practices. The jurisdiction of the federal district courts over unfair labor practices has been expressly limited by Sections 10(j) and [293] 10(l) of the amended National Labor Relations Act to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed.

“(c) Plaintiff has failed to exhaust its administrative remedy under the provisions of the amended National Labor Relations Act.”

Now the purpose of this section is to determine whether or not the defendants, or any of them, are subject to the Act, which is commonly called the Taft-Hartley Act. To be subject to that Act it would be necessary that they were engaged in activities having to do with interstate commerce, affecting interstate commerce.

The complaint sets up a situation that indicates there is some doubt in the minds of the plaintiffs, the California Association of Employers, as to their power or authority for the execution of an agreement that might be made on the closed shop basis. They seem to be fearful of complications arising from an execution of such an agreement, and then also, as pointed out by counsel to the Court, the complaint, in paragraph 5, indicates that the employers will not enter into a [294] contract on a closed shop basis.

The whole question resolves itself around the point as to whether or not the unions here are engaged in interstate commerce. This Court might hold that they were, after a hearing. Another court in San Francisco, under the same set of facts—I suppose there are some California groups connected with the companies here—they might bring an action of the same type engaged in the same industries, and they might get a decision in the district court in Sacramento or San Francisco contrary to the decision that this court might give. There would be appeals to the Circuit Court of Appeals in both cases. That might go on all over the Circuit and continue throughout the United States and I think the statement that was made in the *Amazon Cotton Mill Co. vs. Textile Workers Union*, 167 Federal (2), 183, on page 186, where the Circuit Court goes on to state:

“It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of the act was ‘to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining’; [295] that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined.”

I think we can go a little farther and say it is the intention of Congress to establish an administrative body to determine those questions of unfair labor practices and also the question of jurisdiction under the Act.

I think it is conceded that the National Labor Relations Board has the jurisdiction to determine whether or not these unions are subject to the Taft-Hartley law. It may be that this court also has jurisdiction. I do not think that is a controlling point. Assuming that this court has jurisdiction under the declaratory judgment law, I do not think that the court should exercise such jurisdiction. I think there is some discretion that should be exercised under that declaratory judgment law. This would be a case where the court steps in before an administrative body, created primarily and specifically for the purpose of deciding such questions has an opportunity to act.

It is up to the administrative body, and the [296] motion to dismiss the complaint is granted upon all the grounds urged in the motion. [297]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings in the case entitled, California Association of Employers, Petitioner,

.

vs. Building and Construction Trades Council of Reno, Nevada and Vicinity, et al, No. 700, at the hearing held in Carson City, Nevada, on September 16, 1948, and that the foregoing pages, numbered 1 to 124 inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, November 15, 1948.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed Dec, 21, 1948. [298]

In the District Court of the United States of
America, in and for the District of Nevada
No. 700—Civil

CALIFORNIA ASSOCIATION OF EMPLOY-
ERS, a California Corporation, doing business
under the firm name and style of RENO EM-
PLOYERS COUNCIL,

Petitioner,

vs.

BUILDING AND CONSTRUCTION TRADES
COUNCIL, OF RENO, NEVADA AND VI-
CINITY, Etc.

Respondents.

FINAL JUDGMENT

In this action it appearing from the record that the defendants above named were regularly served with process herein, and thereafter the National

Labor Relations Board filed a Motion to Intervene herein and were by stipulation of the parties permitted to intervene herein, and that said defendants and the Intervenor did file a Motion to Dismiss the Complaint of plaintiff on file herein, and the Motion of the National Labor Relations Board to so dismiss the complaint having come regularly before the Court on the 16th day of September, 1948, for argument, and said Motion to Dismiss the Complaint having been granted upon all the grounds urged in the motion;

It is hereby ordered and adjudged that the said plaintiff take nothing by reason of its Complaint as to the defendants, or any of them, and petitioner's complaint be and hereby is dismissed; that defendants be allowed their costs as provided by law.

Judgment rendered October 18th, 1948.

/s/ ROGER T. FOLEY,
District Judge.

[Endorsed]: Filed Oct. 18, 1948. [300]

[Title of District Court and Cause.]

DECISION OF THE COURT ON MOTION OF
THE NATIONAL LABOR RELATIONS
BOARD TO DISMISS THE COMPLAINT.

The Court: This argument was addressed to the motion of the National Labor Relations Board to dismiss the complaint, the Board having heretofore been, pursuant to stipulation of the parties, permitted to intervene.

The motion is based upon the question of the court's jurisdiction to consider the subject matter of this complaint. Three points are urged:

“(a) The amended National Labor Relations Act vests the National Labor Relations Board with exclusive initial jurisdiction of matters involving unfair labor practices.

“(b) The federal district courts do not have jurisdiction, at the suit of private parties, to determine whether the operations of employers and labor organizations affect commerce within the meaning of [301] the amended National Labor Relations Act, to determine whether unfair labor practices within the meaning of the Act have been committed, or to remedy, by injunction or otherwise, unfair labor practices. The jurisdiction of the federal district courts over unfair labor practices has been expressly limited by Sections 10(j) and 10(l) of the amended National Labor Relations Act to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed.

“(c) Plaintiff has failed to exhaust its administrative remedy under the provisions of the amended National Labor Relations Act.”

Now the purpose of this action is to determine whether or not the defendants, or any of them, are subject to the Act, which is commonly called the Taft-Hartley Act. To be subject to that Act it would be necessary that they were engaged in ac-

tivities having to do with interstate commerce, affecting interstate commerce.

The complaint sets up a situation that indicates there is some doubt in the minds of the plaintiffs, the California Association of Employers, as to their power or authority for the execution of an agreement that might be made on the closed shop basis. They seem to be fearful of complications arising from an execution of such an agreement, and then also, as pointed out by counsel to the Court, the complaint, in paragraph 5, indicates that the employers will not enter into a contract on a closed shop basis.

The whole question resolves itself around the point as to [302] whether or not the unions here are engaged in interstate commerce. This Court might hold they were, after a hearing. Another Court in San Francisco, under the same set of facts—I suppose there are some California groups connected with the companies here—they might bring an action of the same type engaged in the same industries, and they might get a decision in the district court in Sacramento or San Francisco contrary to the decision that this Court might give. There would be appeals to the Circuit Court of Appeals in both cases. That might go on all over the Circuit and continue throughout the United States and I think the statement that was made in the *Amazon Cotton Mill Co. vs. Textile Workers Union*, 167 Federal (2) 183, on page 186, where the Circuit Court goes on to state:—

“It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of the act was ‘to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining’; that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined.”

I think we can go a little farther and say it is the intention of Congress to establish an administrative body to determine those questions of unfair labor practices and also the question of jurisdiction under the Act.

I think it is conceded that the National Labor Relations [303] Board has the jurisdiction to determine whether or not these unions are subject to the Taft-Hartley law. It may be that this court also has jurisdiction. I do not think that is a controlling point. Assuming that this court has jurisdiction under the declaratory judgment law, I do not think that the court should exercise such jurisdiction. I think there is some discretion that should be exercised under that declaratory judgment law. This would be a case where the court steps in before an administrative body, created primarily and specifically for the purpose of deciding such questions has an opportunity to act.

It is up to the administrative body and the motion to dismiss the complaint is granted upon all the grounds urged in the motion. [304]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceeding had at hearings on Motion of the National Labor Relations Board to Dismiss the Complaint in the foregoing entitled action, No. 700, held in Carson City, Nevada, on September 16, 1948, and that the foregoing pages, numbered 1 to 5, inclusive, comprise a full, true and correct transcript of my said shorthand notes of the decision of the court, to the best of my knowledge and ability.

Dated at Carson City, Nevada, September 16, 1948.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed September 17, 1948. [305]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS

Notice is hereby given that California Association of Employers, a California Corporation, doing business under the firm name and style of Reno Employers Council, Plaintiff above named, hereby ap-

peals to the Circuit Court of Appeals for the Ninth Circuit from the Final Judgment and every part thereof entered in this action on the 16th day of September, 1948.

/s/ BROWN & WELLS
By /s/ ERNEST S. BROWN,
Attorneys for Appellants
and

THEODORE HAUGH,

[Endorsed]: Filed Oct. 15, 1948. [308]

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, petition in the above entitled action has appealed to the Circuit Court of Appeals of the United States, Ninth Circuit, from a judgment entered against it in said action in the District Court of United States in and for the District of Nevada, in favor of defendants, and against petitioner, dismissing said action on the 16th day of September, 1948.

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, the Hartford Accident and Indemnity Company, a corporation qualified to do business in the State of Nevada, and the plaintiff or petitioner herein, do hereby jointly and severally undertake and promise, on the part of the petitioner, appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dis-

missal thereof, not exceeding two hundred and fifty dollars (\$250.00), to which amount we acknowledge ourselves jointly and severally bound.

Dated, this 15th day of October, 1948.

CALIFORNIA ASSOCIATION OF EMPLOYERS, a California Corporation, doing business under the firm name and style of RENO EMPLOYERS COUNCIL

By /s/ BERNARD HARTUNG, Agent
Principal

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation

By /s/ J. E. SLINGERLAND,
Attorney in Fact.

[Seal]

(Corporate Seal)

State of Nevada,
County of Washoe—ss.

On this 15 day of October, A.D., 1948, personally appeared before me, a Notary Public in and for Washoe County, State of Nevada, J. E. Slingerland, Attorney in Fact, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of Hartford Accident and Indemnity Company and acknowledged that he subscribed the name of said Hartford Accident and Indemnity Company thereto as Principal, and his own name as attorney in fact freely and voluntarily for the uses and purposes therein mentioned; that said J. E. Slingerland, is known to me to be the attorney-in-fact duly authorized to execute the

same on behalf of said Hartford Accident and Indemnity Company, a corporation, and said J. E. Slingerland, upon his oath did depose that he is the attorney-in-fact for said corporation as above designated; that he is acquainted with the seal of said corporation and that the seal affixed to said instrument is the corporate seal of said corporation; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the county aforesaid, the day and year in this certificate first above written.

(Seal) /s/ WYMAN EVANS,
Notary Public in and for Washoe
County, Nevada.

My Commission Expires: April 22, 1950.

[Endorsed]: Filed October 15, 1948. [311]

[Title of District Court and Cause.]

**NOTICE OF MOTION TO EXTEND TIME
FOR FILING RECORD ON APPEAL**

Notice is hereby given that California Association of Employers, doing business under the firm name and style of Reno Employers Council, plaintiff above named, will on the 22nd day of October, 1948, move that the District Court of the United States

in and for the District of Nevada extend the time for filing the record on appeal from forty (40) days to seventy (70) days from the date of filing the notice of appeal.

/s/ BROWN & WELLS

By /s/ A. D. JENSEN,

Attorneys for Petitioner and
Appellant
and

THEODORE HAUGH.

[Endorsed]: Filed October 15, 1948. [315]

[Title of District Court and Cause.]

COPY OF MINUTE ORDER OF
OCTOBER 26, 1948

Upon Motion of Messrs. Brown & Wells, attorneys for the petitioner and appellant, it is ordered that the time for filing and docketing the record on appeal in the United States Court of Appeals be, and the same hereby is, extended from forty days to seventy days from the date of filing the notice of appeal. [314]

[Title of District Court and Cause.]

COPY OF MINUTE ORDER OF
DECEMBER 22, 1948

Upon Motion of Messrs. Brown & Wells, attorneys for the petitioner and appellant, it is ordered that the time for filing and docketing the record on appeal in the U. S. Circuit Court of Appeals be, and the same hereby is, extended to January 13, 1949. [315]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court of the District of Nevada, including the records, papers and files in the case of California Association of Employers, a California Corporation, doing business under the firm name and style of Reno Employers Council, Petitioner, vs. Building and Construction Trades Council of Reno, Nevada and Vicinity, et al., Respondents, said case being No. 700 on the civil docket of said Court.

I further certify that the attached transcript consisting of 323 typewritten pages numbered from 1 to 323, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the "Designation of Record" filed in said case and made a part of the transcript hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

I further certify that accompanying this record is a copy of "Oral Opinion of the Court Made and Entered May 28, 1948," item No. 5 of appellant's "Designation of Record," said opinion being a copy made from the Reporter's Transcript, filed

June 2, 1948, Hearing on Order to Show Cause held on May 28, 1948. The said writ not having been filed in this office is certified to only as being an excerpt from said Reporter's Transcript. A certified copy of said Reporter's Transcript is made a part of this record.

And I further certify that the cost of preparing and certifying to said record, amounting to \$36.50, has been paid to me by Messrs. Brown & Wells, attorneys for the appellant herein.

Witness my hand and the seal of said United States District Court this 7th day of January, 1949.

(Seal) /s/ AMOS P. DICKEY,
Clerk, U. S. District Court.

[Endorsed]: No. 12150. United States Court of Appeals for the Ninth Circuit. California Association of Employers, a California Corporation doing business under the firm name and style of Reno Employers Council, appellant, vs. Building and Construction Trades Council of Reno, Nevada and vicinity, et al., and National Labor Relations Board, appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed January 11, 1949.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for
the Ninth Circuit

No. 12150

CALIFORNIA ASSOCIATION OF EMPLOY-
ERS, A California Corporation, doing business
under the firm name and style of RENO EM-
PLOYERS COUNCIL,

Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF RENO, NEVADA AND VI-
CINITY, Etc.,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO
RELY ON APPEAL.

Point 1.

The District Court should have issued a prelimin-
ary injunction pendente lite as prayed in complaint
of plaintiff and filed on the 21st day of May, 1948.

Point 2.

The District Court erred in dismissing the com-
plaint, on motion of the National Labor Relations
Board and filed on the 16th day of September, 1948.

/s/ BROWN & WELLS,

By /s/ A. D. JENSEN

Brown & Wells and Theodore Haugh, Attorneys for
Appellant.

(Acknowledgment of Service)

[Endorsed]: Filed January 13, 1949. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the above-entitled Court:

Pursuant to Rule 19 (6) of the United States Court of Appeals for the Ninth Circuit the following designation of record is hereby made for printing of the record, and necessary for consideration and decision on appeal of the above-entitled cause:

Original Complaint (with Exhibits A, B, C, D, E, and F) filed May 21, 1948.

Order to Show Cause and Temporary Restraining Order filed May 21, 1948.

Motion to Dismiss Order to Show Cause and Restraining Order filed May 28, 1948.

Order Denying the Application for a Preliminary Injunction and Dissolving the Temporary Restraining Order rendered the 28th day of May, 1948, and filed June 2, 1948.

Decision of the Court on Motion for a Preliminary Injunction, rendered May 29, 1948.

Reporter's Transcript on Hearing on Order to Show Cause, filed June 2, 1948.

Motion to Dismiss the Complaint filed by all defendants except Defendant Local Unions of Operating Engineers, No. 3, filed June 7, 1948.

Motion to Dismiss the Complaint as to Operating Engineers Local No. 3, filed June 7, 1948.

Motion of the National Labor Relations Board for Leave to Intervene filed July 2, 1948.

Motion for Order Exonerating Cash Bond, filed July 6, 1948.

Order Exonerating Cash Bond, dated September 17, 1948.

Consent to Intervention of the National Labor Relations Board by defendant dated July 6, 1948, and filed on the 8th day of July, 1948.

Consent to Intervention of the National Labor Relations Board by Plaintiff dated July 13, 1948, and filed July 16, 1948.

Stipulation of Defendant Operating Engineers, Local No. 3, to the Intervention of the National Labor Relations Board, filed August 6, 1948.

Motion to dismiss Complaint filed by all defendants except defendant Local Union of Operating Engineers, No. 3 filed September 7, 1948.

Minute Order Granting the National Labor Relations Board to Intervene.

Motion to Dismiss the Complaint filed by National Labor Relations Board on September 16, 1948.

Reporter's Transcript of Hearing on Motion to Intervene and Motion to Dismiss filed September 17, 1948.

Final Judgment Dismissing the Complaint filed October 18, 1948.

Decision of the Court on Motion of the National Labor Relations Board to Dismiss the Complaint, filed September 17, 1948.

Notice of Appeal to the Ninth Circuit Court of Appeals filed October 15, 1948.

Undertaking on Appeal filed on the 15th day of October, 1948.

Notice of Motion to Extend Time for Filing Record on Appeal filed October 15, 1948.

Order Extending Time for Filing and Docketing The Record on Appeal entered October 26, 1948.

Statement of Points on Which Appellant Intends to Rely on Appeal, filed herein on December 21, 1948.

This Praecipe and service thereon.

Said Transcript to be prepared as required by law and the Rules of Civil Procedure, and to be filed in the office of the Clerk of the Ninth Circuit Court of Appeals on or before the 24th day of December, 1948.

Dated: January 11, 1949.

/s/ BROWN & WELLS,

By /s/ A. D. JENSEN, and

THEODORE HAUGH,

Attorneys for Petitioner and
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed January 13, 1949. Paul P. O'Brien, Clerk.

No. 12150

IN THE

United States Court of Appeals

For the Ninth Circuit

CALIFORNIA ASSOCIATION OF EMPLOYERS,
A California Corporation doing business under the firm name and style of
RENO EMPLOYERS COUNCIL,

Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF RENO, NEVADA AND VICINITY,
et al., and NATIONAL LABOR RELATIONS BOARD,

Appellees.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court
for the District of Nevada

BROWN & WELLS
and THEODORE HAUGH,

10 State Street,
Reno, Nevada

for Appellant.

FILED

APR 5 1949

PAUL P. O'BRIEN,
CLERK



Subject Index

	Pages
Statement as to Jurisdiction.....	1
Statement of the Case.....	3
Argument	5
The District Court had jurisdiction to determine the controversy under Declaratory Judgment remedy hence, error to grant motion to dismiss filed by National Labor Relations Board.....	5
Specification of Error No. 1.....	5
The District Court of the United States in and for the District of Nevada, had jurisdiction to issue a preliminary injunction pendente lite, as the Norris-LaGuardia Act, did not apply as no labor dispute was present.....	9
Specification of Error No. 2.....	9

Table of Authorities Cited

Cases

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 81 L.ed. 617, 57 S.Ct. 461.....	7
Bakery Sales Drivers Local Union No. 33 v. Wagshol, 333 U. S. 437, 68 S.Ct. 630, L.ed. 599.....	11
Columbia River Packers Association, Inc., v. Hinton, 315 U. S. 143, 86 L.ed. 750, 62 S.Ct. 520.....	10
Franklin Life Ins. Co. v. Johnson (C. C. A. 10th) 157 F. (2d) 653.....	8
International Brotherhood, etc. v. Riley,—N. N.—59 A 2d 476.....	6
Tennessee Coal, Iron & R. Co. v. Muscada Local 123 (C. C. A 5th) 137 F. (2d) 136.....	8
U. S. v. United Mine Workers, 330 U. S. 258, 91 L.ed. 884, 67 S.Ct. 677.....	14

Constitutions

	Pages
United States, Art. 1, Sec. 8, Clause 3.....	2

Statutes

15 U. S. C. A. Sec. 101.....	10
28 U. S. C. A. Sec. 41 (8)	3, 5, 6
28 U. S. C. A. Sec. 225.....	3
28 U. S. C. A. Sec. 400.....	3, 5
29 U. S. C. A. Sec. 101.....	9
29 U. S. C. A. Sec. 110.....	12
29 U. S. C. A. Sec. 107.....	9
29 U. S. C. A. Sec. 151 et seq.....	2, 3
Federal Rules of Civil Procedure 57.....	6
Federal Rules of Civil Procedure 73, 75.....	3
Labor Management Relations Act 194.....	4, 6, 7, 12
Norris-LaGuardia Act	9, 12, 13, 14, 15

Texts

Anderson, Declaratory Judgments, Sec. 169.....	8
--	---

No. 12150

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CALIFORNIA ASSOCIATION OF EMPLOYERS,
A California Corporation doing business under the firm name and style of
RENO EMPLOYERS COUNCIL,

Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF RENO, NEVADA AND VICINITY, et al., and NATIONAL LABOR RELATIONS BOARD,

Appellees.

APPELLANT'S OPENING BRIEF

**Appeal from the United States District Court
for the District of Nevada**

STATEMENT AS TO JURISDICTION

California Association of Employers, a California corporation, qualified to and doing business in the State of Nevada under the fictitious name of RENO EMPLOYERS COUNCIL, on May 21, 1948, filed its complaint against the Building and Construction Trades Council of Reno, Nevada, and vicinity, and various local affiliates of said Council

working under a master agreement with the various members of Appellant (R.p.2) in the United States District Court for the District of Nevada. Appellant alleged that the action arose under Article 1, Sec. 8, Clause 3, of the Constitution of the United States and the Act of Congress 49 Stat. 449, U.S.C.A., Title 29, Secs. 151-166 as amended by Act of Congress 61 Stat. 136, Title 29, U.S.C.A., Secs. 151-197 (R.p.5). The Court issued an order to show cause and a temporary restraining order (R.p.45). Appellants filed a motion to vacate the Order to Show Cause and Restraining Order (R.p.47). On May 28, 1948, the Court dissolved the temporary restraining order and denied an application for a preliminary injunction. The National Labor Relations Board filed a Motion for Leave to Intervene (R.p.149) and the parties stipulated that they might do so (R.p.154), an order was so entered (R.p.158). All appellees filed motions to dismiss the Complaint (R.p.145, R.p.147, R.p.155) as did the Intervenor (R.p.158). Argument was had on the motion of the National Labor Relations Board to dismiss the Complaint (R.p.160). On the 16th day of September, 1948, the Court entered its order dismissing the Complaint (R.p.268) and within 30 days thereafter, to-wit: October 15, 1948, notice of appeal to this Court was duly filed (R.p.272). On October 15, 1948, bond for costs on appeal was furnished by appellant and filed (R.p.273). On October 15, 1948, the Court, upon application of appellant, entered its order extending the time to file and docket the record on appeal from forty to seventy days (R.p.276). On December 22, 1948, the Court, upon application of appellant, further extended said time to January 13, 1949 (R.p.276).

The jurisdiction of the District Court arose under section 24 of the Judicial Code (28 U.S.C.A. Sec. 41 (8)), and Section 274 (d) of the Judicial Code (28 U.S.C.A. 400).

The Circuit Court of Appeals has jurisdiction of this appeal pursuant to Section 128 of the Judicial Code, 28 U.S.C.A., Section 225; Rules 73 and 75 of Federal Rules of Civil Procedure of the United States.

STATEMENT OF THE CASE

On May 24, 1947, Appellant, representing some 94 business concerns engaged in the building and construction industry in the western part of Nevada, and in the eastern part of the State of California, entered into a master contract containing provisions for wages, hours, and terms of employment with the Building and Construction Trades Council of Reno, Nevada, and vicinity. The latter represented 17 American Federation of Labor Unions whose members were employed in said industry. The agreement, by its terms, was to be effective from May 24, 1947, to and including May 21, 1948 (R.p.4.).

On April 15, 1948, negotiations for a new contract were commenced (R.p.7). The employee group desired provisions in the contract relative to a closed shop or other from of union security. The employer group took the position that their industry was in interstate commerce or affected the same, in such a manner as to place the industry under the Labor Management Relations Act, 1947, c.120, Title 1, Sec. 101, 61 Stat. 136, 29 U. S. C. A. s 151 et seq., and there-

fore, no negotiations or contracts relative to a closed shop or union security could be entered into without the employee group first complying with the provisions of that Act relative to elections for the purpose of securing authority to request union security provisions in the contemplated agreement (R.p.8). The employee group refused to comply with the provisions of Sec. 8 A. 1. of the Labor Management Relations Act of 1947 (Chapter 120, Public Law 101) contending that the industry did not come under the purview of that act. The employer group contended that the master agreement could not be continued after May 21, 1948, unless such compliance was had, and on said date petitioned the Federal District Court for the State of Nevada, for a declaratory judgment to determine whether or not the National Labor Relations Act of 1947 governed and controlled any collective bargaining agreement between the parties, and for a temporary restraining order to maintain the status quo between the parties until judgment was entered (R.p.15).

All Appellees contended that the District Court was without jurisdiction and that the jurisdiction of the National Labor Relations Board was exclusive. The Court so held and dismissed the Complaint (R.p.266).

ARGUMENT

The District Court Had Jurisdiction to Determine the Controversy Under Declaratory Judgment Remedy Hence, Error to Grant Motion to Dismiss Filed By National Labor Relations Board.

Specification of Error No. 1

At the time of the filing of this suit Section 274 (d) of the Judicial Code (28 U.S.C.A. 400) read as follows:

“(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

“(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

“(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.”

and Section 24 of the Judicial Code (28 U. S. C. A. 41(8)) read:

“The District Court shall have original jurisdiction as follows: . . . (41(8)) Suits under interstate commerce laws.”

The Labor Management Relations Act of 1947 did not divest District Courts of jurisdiction to grant declaratory judgments. Section 10(a) of the Act specifically states that the power of the Board shall not be exclusive in certain instances.

“Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section (8) affecting commerce. The power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . .”

Rule 57 of the Federal Rules of Civil Procedure provides:

“ . . . The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate . . .”

In view of the foregoing, and despite the availability of other relief, declaratory relief was an appropriate remedy in the instant case if the other requisites for such relief appeared upon the face of the petition or complaint.

International Brotherhood, etc. v. Riley,—N. H.—
59 A 2d 476.

The requisite conditions and precedents which must be shown in order to obtain declaratory relief, in addition to jurisdictional requirements which are the same as in other types of actions (and which appear upon the face of the

complaint) are: (1) There must be a justiciable controversy; that is, a controversy "that is appropriate for judicial determination"; one that is not of "hypothetical or abstract character" or that is "academic or moot"; (2) The controversy must be between parties whose interests are adverse; (3) There must be a tangible legal interest in the controversy by the party asserting it; and (4) The issue presented must be ripe for adjudication.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 81 L.ed.617, 57 S.Ct. 461.

There was a justiciable controversy in the instant case, to-wit: a disagreement as to whether the industry involved was engaged in interstate commerce or affected the same in such a manner as to place the negotiations between the parties under the rules delineated in the Labor Management Relations Act of 1947 (R.p.8). The controversy was between parties whose interests were adverse (R.p.7). There was a tangible legal interest in the controversy by the party asserting it—for if the appellant entered into a contract providing for a closed shop or other union security provision and it were later determined that the industry represented came under the provisions of the Labor Management Relations Act of 1947, each of the firms represented by Appellant might, under the terms of that Act be subjected to penalties under the provisions thereof. The issue presented was ripe for adjudication. The parties were stalemated and the existing contract would, by its terms, expire at midnight, May 21, 1948.

In its opinion dismissing the Complaint (R.p.271) the District Court stated:

“ . . . I think it is conceded that the National Labor Relations Board has the jurisdiction to determine whether or not these unions are subject to the Taft-Hartley law. It may be that this court also has jurisdiction. I do not think that is a controlling point. Assuming that this court has jurisdiction under the declaratory judgment law, I do not think that the court should exercise such jurisdiction. I think there is some discretion that should be exercised under that declaratory judgment law . . . ”

It is respectfully submitted that if jurisdictional elements exist the “discretion” of the Court is not as to entertaining the action, but as to entering or declining to enter the judgment after examining the facts and legal contentions.

Anderson, Declaratory Judgments, § 169.

Nor is the discretion absolute, as in granting or denying motions for a new trial in the Federal Court. It is a judicial discretion reviewable on appeal.

Franklin Life Ins. Co. v. Johnson (C. C. A. 10th)
157 F. (2) 653.

Tennessee Coal, Iron & R. Co. v. Muscada Local
123 (C. C. A. 5th) 137 F. (2d) 136.

The District Court of the United States In and For the District of Nevada, Had Jurisdiction to Issue a Preliminary Injunction Pendente Lite, As the Norris-La Guardia Act, Did Not Apply As No Labor Dispute Was Present.

Specification of Error No. 2

The Norris-LaGuardia Act, 29 U. S. C. A., Sec. 101 et seq., prohibits any court of the United States to issue any restraining order, temporary or permanent injunction "in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunctions be issued contrary to the public policy disclosed in such sections." (29 U. S. C. A., Sec. 101.)

Injunctions may issue, but must be in strict conformity with the provisions of the act, and not be contrary to expressed policy therein. If, however, a "labor dispute" is present and after hearing of testimony of witnesses in open court, in support of the allegations of a complaint under oath, and findings that unlawful acts have been threatened; that irreparable injury to complainant's property will follow; that greater injury will be inflicted on complainant if relief is withheld; and there is no adequate remedy at law, nor public official charged with a duty to protect complainant's property, the court possesses plenary power to issue an injunction. (29 U. S. C. A., Sec. 107.)

But, if there is no "labor dispute," an employer will have grounds for obtaining an injunction to prevent unions from interfering with his business.

In *Columbia River Packers Association, Inc., v. Hinton*, 315 U. S. 143, 86 L.ed. 750, 62 S.Ct. 520, the dispute arose over the terms and conditions under which Pacific Coast Fishermen's Union (respondents) would sell fish to the canning plants. The District Court held that since no "labor dispute" existed, the jurisdictional requirements of the Norris-LaGuardia Act were irrelevant, and after determining respondents had violated the Sherman Act, 26 Stat. at L. 209, Chap. 647, 15 U. S. C. A. Sec. 1, issued an injunction. The Court of Appeals for the Ninth Circuit reversed, holding that a "labor dispute" existed which, therefore, deprived the lower court of jurisdiction. Certiorari was granted and the Supreme Court sustained the holding of the District Court.

The controversy in the Columbia River Packers' case, *supra*, was precipitated by refusal of the petitioners to accede to respondents' demand that petitioners "not buy fish from non-members of the union." Mr. Justice Black in delivering the opinion stated: (315 U. S. 145.)

"We think that the court below was in error in holding this controversy a 'labor dispute' within the meaning of the Norri-LaGuardia Act. *That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association . . . of persons . . . seeking to*

arrange terms or conditions of employment' calls for no extended discussion." (Emphasis ours).

Again on page 146, 315 U. S., the court remarked:

"We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. (Emphasis ours).

It does not necessarily follow that every dispute between employer and employee, or the agents of either, precipitates a "labor dispute." In *Bakery Sales Drivers Local Union No. 33 v. Wagshol*, 333 U. S. 437, 68 S.Ct. 630, 92 L.ed. 599, the Supreme Court cautioned that there must be more than a dispute or controversy between employer and employee to fall within the meaning of a "labor dispute" as defined in the Norris-LaGuardia Act.

In the *Bakery Sales Drivers* case, the controversy concerned the method of payment by the proprietor of a delicatessen for bread purchased. The union representative of the driver insisted payment should be made directly to the driver; the delicatessen proprietor maintained payment should be made to the bakery. The controversy caused the union to picket and boycott the delicatessen shop. The District Court granted a temporary restraining order and, at the same time, denied a motion to dismiss. Defendant-appellant union filed a notice of appeal which plaintiff-

respondent moved to dismiss. Appeal as a matter of right would follow if a "labor dispute" existed. (29 U. S. C. A., Sec. 110.)

The Court, speaking through Mr. Justice Frankfurter, said:

"To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, quality, delivery, payment, credit or any other business transaction into a "labor dispute." Cf. *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143, 86 L.ed. 750, 62 S.Ct. 520. Furthermore, on the basis of what we have before us, respondent's disagreement with Hinkle over the delivery hour was a dead controversy, not involved in the subsequent dispute with the union, or in the boycott against which the injunction was directed."

In the instant case before this court for decision, the first question presented was the power of the District Court to preserve the status quo pending determination on the merits as to whether the Labor Management Relations Act, 1947 governed future negotiations. If the Labor Management Relations Act, 1947, applied, then the closed shop provisions sought by respondents herein could not be included within the provisions of any master agreement which would succeed the agreement expiring on May 21, 1948. No master agreement between the parties could be signed prior to ascertaining whether or not the Labor Management Relations Act, 1947, controlled the negotiations. There could not be a "labor dispute" within the purview of the Norris-

LaGuardia Act, unless and until the initial question of the applicable and controlling law was settled.

Repeatedly in the lower court this position was urged and asserted to the court for its determination. (R. pp. 73, 74, 75, 77, 78, 82, 127, 133). The District Court in rendering its ruling on the motion for a preliminary injunction stated:

“I cannot understand how it could be said there is no labor dispute involved here. I think counsel has stated that the purpose of this is to prevent labor dispute from arising, or series of labor disputes from arising, so then we are, of course, interested, involved here in consideration of labor disputes not existing now, but contemplated in the future.” (R.p.141).

“The only question before the court is whether or not this preliminary restraining order should be continued or whether a temporary restraining order or preliminary injunction should be issued pending lite, and that is the only point I am attempting to decide.” (R.p.143).

The learned court in deciding it was without power to grant a preliminary injunction because a “labor dispute” existed (R.p.141) assumed, without deciding, the precise question to be resolved, to-wit: are appellants engaged in interstate commerce? The District Court’s holding of lack of power to issue a preliminary injunction was predicated upon the proposition that the Norris-LaGuardia Act precluded issuing an injunction because a “labor dispute” within the purview of Sec. 7, of that Act. The Norris-LaGuardia Act would be applicable if, and only if, appellant is engaged in, or affecting interstate commerce. The court ex necessitate assumed that very issue to arrive at its decision.

The Norris-LaGuardia Act limited the power of federal courts to grant injunctions, but it did not extinguish this power. In *United States v. United Mine Workers*, 330 U. S. 258, 91 L.ed. 884, 67 S.Ct. 677, Mr. Chief Justice Vinson, stated, in delivering the majority opinion of the court:

“By the Norris-LaGuardia Act, Congress divested the Federal courts of jurisdiction to issue injunctions in a specified class of cases. It would probably be conceded that the characteristics of the present case would be such as to bring it within that class if the basic dispute had remained one between defendants and a private employer, and the latter had been the plaintiff below.” (330 U. S. at page 270).

The Chief Justice, thereafter (330 U. S. 292), observed:

“Pending a decision on a doubtful question of jurisdiction, the District Court was held to have power to maintain the status quo and punish violations as contempt.”

It is true the Supreme Court in discussing the applicability of the Norris-LaGuardia Act in the *United Mine Workers*' case, did so addressing the same to argument of appellants, that issuance of the injunction was contrary to said Act, since the United States must be considered as employer, and therefore, within the purview of the Norris-LaGuardia Act. However, it is certainly clear therefrom that injunctive remedies in labor disputes are not completely extinguished by the Norris-LaGuardia Act. Even if it be assumed that a “labor dispute” existed within the defined meaning of the Norris-LaGuardia Act, the District Court, upon making necessary findings of fact, could have granted an injunction. 29 U. S. C. A., Sec. 107.

Appellant's theory herein has been, and now is, that there existed no "labor dispute" and, therefore, the Norris-LaGuardia Act was inapplicable. Accordingly, the District Court should have granted the injunction as prayed.

For the reasons above presented to this Honorable Court, appellant respectfully asks that the judgment and decree of the District Court be reversed.

Dated, Reno, Nevada.

April 1, 1949.

Respectfully submitted,

BROWN & WELLS

THEODORE HAUGH

Attorneys for Appellant.



No. 12,150

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CALIFORNIA ASSOCIATION OF EMPLOYERS
(a California corporation), doing
business under the firm name and
style of Reno Employers Council,

Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF RENO, NEVADA AND VI-
CINITY, ET AL., and NATIONAL LABOR
RELATIONS BOARD,

Appellees.

BRIEF FOR APPELLEES

**BUILDING AND CONSTRUCTION TRADES COUNCIL
OF RENO, NEVADA, AND VICINITY, ET AL.**

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Subject Index

	Page
Statement as to jurisdiction	1
Introduction	2
Factual errors contained in appellant's "Statement as to Jurisdiction"	3
Factual errors contained in appellant's "Statement of the Case"	5
Argument	8
The District Court has no jurisdiction to determine the controversy under the Declaratory Judgment Act or any other Act and the District Court did not err in granting the motion to dismiss filed by the National Labor Relations Board	8
The District Court of the United States in and for the District of Nevada, had no jurisdiction to issue a preliminary injunction pendente lite, a labor dispute being present and the Norris-La Guardia Act being applicable	26
The appeal should be dismissed because the grounds upon which it is founded are now moot. No actual controversy exists and the complaint does not allege an actual controversy	31
Conclusion	48

Table of Authorities Cited

Cases	Pages
Abelleiro v. Dist. Court of Appeals, 17 Cal. (2d) 280.....	25
Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617	46
Aetna Cas. & Sur. Co. v. Quarles (CCA S.C. 1937), 92 Fed. (2d) 321	40
American Chemical Paint Co. v. Dow Chemical Co. (CCA Mich. 1947), 161 Fed. (2d) 956	44
Ashwander v. Tennessee Valley Authority. 297 U. S. 288, 80 L. Ed. 688	34, 41
Bakery Sales Drivers Union No. 33 v. Wagshal, 33 U. S. 437, 68 S. Ct. 630, 92 L. Ed. 792	26, 28
Chicago City Bank & Trust Co. v. Board of Education of City of Chicago, 54 N. E. (2d) 498, 386 Ill. 508.....	37
Chicago Furniture Forwarding Co. v. Bowles (CCA Ill. 1947), 161 Fed. (2d) 411	40
Chicago Pneumatic Tool Co. v. Biegler (CCA Pa. 1945), 151 Fed. (2d) 784	45
Cleveland CC & St. L. Ry. Co. v. U. S., 275 U. S. 404, 72 L. Ed. 338	23
Columbia River Packers Association, Inc. v. Hinton, 315 U. S. 143, 86 L. Ed. 750, 62 S. Ct. 520.....	26
Costeel Distributing Company, 76 N.L.R.B. 153 (1948), 21 L.R.M. 162	5
Diedricksen v. Sutch (Cal.), 118 Pac. (2d) 863.....	37
Doehler Metal Furniture Co. v. Warren (App. D.C. 1942), 129 Fed. (2d) 43	40
Fedor Tepeco Employees' Union v. The Enamel Products Co. (Ohio 1940), 2 Labor Cases 1008	22, 25
Fidelity Union Trust Company v. Ackerman, 121 N.J. Eq. 497, 191 Atl. 813	21
Gerry of California v. Superior Court in and for Los Angeles County (Cal. June 16, 1948), 194 P. (2d) 689, 32 Cal. (2d) 119	10

Pages

Guardian Life Ins. Co. of America v. Kortz (CCA Colo. 1945), 151 Fed. (2d) 582	44
Hargrove v. American Cent. Ins. Co. (10 CCA 1942), 125 Fed. (2d) 225	44
Hill v. State of Florida ex rel. Watson, 325 U. S. 538, 89 L. Ed.	23
Imperial Irrigation District v. Nevada-California Electric Corp. (CCA 9), 111 Fed. (2d) 319	40
In re James Lincoln, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984	36
International Brotherhood, etc. v. International Union, etc., 106 Fed. (2d) 871	47
International Brotherhood of Teamsters v. International Union of United Brewery, etc., 106 Fed. (2d) 871.....	25, 26
Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. Ed. 893	10
Keller v. American Cyanamid Company, New Jersey, Chancery Court (1942), 6 Labor Cases 63630.....	21, 25
Keely v. Ophir Hill Consol. Mining Co., et al. (CCA 8th), 169 Fed. 601	35
Kimball v. Kimball, 174 U. S. 158, 19 Sup. Ct. 639, 43 L. Ed. 932	36
Kredo v. Phelps, 145 Cal. 526	25
Magic Foam Sales Corp. v. Mystic Foam Corp. (CCA Ohio 1948), 167 Fed. (2d) 88	44
Manning v. Feidelson, 175 Tenn. 576, 136 S. W. (2d) 510..	21, 22
McDonald v. Brewery & Beverage Drivers & Helpers and Warehousemen Local Union No. 792, 9 N. W. (2d) 770, 215 Minn. 274	38
Miles Laboratories v. Federal Trade Commission (1944), 140 Fed. (2d) 683, 78 U. S. App. D. C. 326, cert. den. 64 S. Ct. 1263, 322 U. S. 752, 88 L. Ed. 1582.....	45
Montgomery Ward Employees Ass'n v. Retail Clerks International Protective Ass'n, 38 Fed. Supp. 321.....	22, 23
Morris Plan Bank of Ft. Worth v. Ogden (Texas), 144 S. W. (2d) 998	37
Meyers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 82 L. Ed. 639	10, 25

	Pages
Mountain States Beet Growers Marketing Association v. Wagner (Colo. 1926), 247 Pac. 804.....	38
New Discoveries v. Wisconsin Aluminum Research Foundation, 13 Fed. Supp. 596	39
Newport News Shipbuilding & Drydock Co. v. Schauffler, 303 U. S. 54, 82 L. Ed. 646	10
Oliver v. Local or Subordinate Lodge No. 656 (Tenn. 1944), 185 S. W. (2d) 525, 9 Labor Cases 67044.....	21
Sanco Piece Dye Works v. Herrick, 33 Fed. Supp. 80.....	22
State v. Jones (Wyo.), 157 Pac. (2d) 993.....	41
Stone Logging & Contracting Co. v. International Woodworkers of America, 135 Pac. (2d) 759 (Oregon).....	23
Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., 137 Fed. (2d) 176, affirmed 64 S. Ct. 1257, 322 U. S. 771, 88 L. Ed. 1596	43
United Brick and Clay Workers of America v. Junction City Clay Company (6 CCA), 158 Fed. (2d) 552.....	24
United States v. United Mine Workers, 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677	28
Walling v. Lacy (D.C. Colo), 51 Fed. Supp. 1002.....	38
Walling v. Shenandoah-Dives Mining Co. (CCA Colo.), 134 Fed. (2d) 395	34
West Publishing Co. v. M. C. Colgan, 138 Fed. (2d) 320..	45

Statutes

Judicial Code, Section 128	1
Judicial Code, Section 274(d) (28 U.S.C.A. 400).....	43
Norris-LaGuardia Act, 29 U.S.C.A. 101	7, 26
Norris-LaGuardia Act, 47 Stats. 70	7, 26
29 U.S.C.A. 107	29
29 U.S.C.A. 115	7
29 U.S.C.A. 152 (7)	10
29 U.S.C.A. 152 (9)	10

	Page
29 U.S.C.A. 158 (b) (3)	8
28 U.S.C.A. 225	1
NLMRA:	
Section 2(7)	10
Section 2(9)	10
Section 8(b) (3)	8
Section 9(a)	8
Section 9(g)	9

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No. 12,150

IN THE

**United States Court of Appeals
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CALIFORNIA ASSOCIATION OF EMPLOYERS
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Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF RENO, NEVADA AND VI-
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RELATIONS BOARD,

Appellees.

BRIEF FOR APPELLEES

**BUILDING AND CONSTRUCTION TRADES COUNCIL
OF RENO, NEVADA, AND VICINITY, ET AL.**

STATEMENT AS TO JURISDICTION.

Appellant prosecutes this appeal from an Order of the District Court dismissing its complaint for a declaratory judgment and preliminary injunction.

This Court has jurisdiction of the appeal by virtue of Section 128 of the Judicial Code, 28 U.S.C.A., Section 225.

INTRODUCTION.

This brief is filed on behalf of the defendant Building and Construction Trades Council of Reno and Vicinity and on behalf of Hod Carriers Building and Common Laborers Local Union No. 169, United Brotherhood of Carpenters and Joiners of America, Local Union No. 971, Operative Plasterers and Cement Finishers Local Union Number 241, Bridge Structural and Ornamental Iron Workers Local Union Number 118 of Sacramento, California, Electrical Workers Local Union Number 401, Painters, Decorators and Paperhangers Local Union Number 567, and Boiler Makers, Iron Ship Builders and Helpers Local Union Number 94, Bricklayers, Masons and Plasterers Local Union Number 6, Journeymen Plumbers and Steam Fitters Local Union Number 350, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Union Number 224, Sheet Metal Workers International Association Local Union Number 26, Elevator Constructors Local Union Number 401, Wood, Wire and Metal Lathers Local Union Number 208, Blacksmiths, Drop Forgers and Helpers Local Union Number 158, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Number 533, and insofar as it has to do solely with the question of the District Court's lack of jurisdiction, Local Union of Operating Engineers No. 3, which appeared solely for the purpose of challenging the jurisdiction of the District Court.

**FACTUAL ERRORS CONTAINED IN APPELLANT'S
"STATEMENT AS TO JURISDICTION."**

Appellant states :

"California Association of Employers * * * filed its complaint against Building and Construction Trades Council of Reno, Nevada and Vicinity, and various local affiliates of said Council working under a master agreement with the various members of Appellant (R. p. 2) in the United States District Court for the District of Nevada." (App. Br. 1-2.)

This is neither an accurate nor correct statement of the facts. The petition on its face shows that attached to it and made a part of it is the alleged "master agreement". (R. 18-30.)

The agreement recites :

"This Agreement made and entered into by and between the Reno Employers Council for and on behalf of the *General Contractors, Sub-Contractors, who have signified their approval thereof by the attached authorization attached hereto*, and hereinafter referred to as the Employer and the Building and Construction Trades Council of Reno, Nevada, and vicinity, and its various affiliates for the counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka Counties, all affiliated with the American Federation of Labor, who except (the word 'accept' intended) for themselves, and for their various crafts councils and for their various local Unions, which have jurisdiction over the work in the territory hereinabove described, hereinafter referred to as the Union.

"Each local Union authorizing the acceptance of this agreement does so by attaching a stipulation to that effect, signed by its duly elected officers, which will be attached hereto, and becomes a part hereof." (R. 18-19.) (Italics ours.)

The "Master Agreement" is therefore binding only upon the following:

1. Employers General Contractors, Sub-Contractors who have signified their approval thereof by authorizations attached thereto.

2. Local Unions authorizing the acceptance of this agreement * * * by attaching a stipulation to that effect, signed by its duly elected officers which will be attached thereto, and become a part thereof.

There is no allegation that any employer authorization was ever attached to the "Master Agreement" (R. 2-44) and the complaint on its face establishes that the only Local Union Stipulations ever attached to the "Master Agreement" were those of Hod Carriers Building and Common Laborers Local Union No. 169, Painters, Decorators and Paperhangers Local Union Number 567, Plumbers and Steam Fitters Union Local 350, United Slate, Tile and Composition Roofers, Damp and Waterproof Association Local No. 224 and United Brotherhood of Carpenters and Joiners of America Local Union 971. (R. 30-35.)

In other words the Employer Association and the Council negotiated a form of agreement which their members individually could accept or reject. All of the members of the Employers Association rejected

the form of agreement and only five (5) of the sixteen (16) alleged local affiliates of the Council accepted it.

It is obvious, therefore, that what is involved in this proceeding so far as the "Master Agreement" is concerned is not an agreement or contract but the contents of a form of agreement or contract which the petitioning appellant Employer Association desired to recommend to its members, none of whom accepted the form agreement drafted in 1947.

The fact that the individual members of the Employer Association reserved the right to independently and individually determine whether they would or would not become parties to or be bound by the agreement is of vital importance when we come to consider the problem of "Appropriate Unit" under the Labor Management Relations Act, 1947.

For example the National Labor Relations Board in *Costeel Distributing Company*, 76 N.L.R.B. 153 (1948), 21 L.R.M. 162, held that where the employers concerned have not delegated to any joint body the authority to bargain collectively a multi-employers unit is not appropriate.

**FACTUAL ERRORS CONTAINED IN APPELLANT'S
"STATEMENT OF THE CASE".**

Appellant states:

"On May 24, 1947, appellant, representing some 94 business concerns engaged in the build-

ing and construction industry in the western part of Nevada, and in the eastern part of the State of California, entered into a master contract containing provisions for wages, hours, and terms of employment with the Building and Construction Trades Council of Reno, Nevada, and vicinity. The latter represented 17 American Federation of Labor Unions whose members were employed in said industry. The agreement, by its terms, was to be effective from May 24, 1947, to and including May 21, 1948 (R. p. 4).” (App. Br. 3.)

The essential factual errors contained in the paragraph last above set out have already been pointed out. We will not burden the Court by repeating them here.

In addition to the foregoing, the Statement of the Case errs by omission:

1. There is no allegation in the complaint:
 - (a) That the Council had been certified to represent all crafts, or,
 - (b) That any local union had been certified to represent its craft.
2. The affidavits submitted in opposition to the order to show cause and in support of the motions to dismiss, which affidavits are uncontradicted and therefore must be accepted as true, show:
 - (a) That as of September 3, 1948, thirteen (13) days prior to the hearing on the motion to dismiss, the alleged Master Agreement attached to the complaint as Exhibit “A”:

(1) has been and is of no force and effect, that none of the defendant unions individually, or as a group are employed under or by virtue of said alleged contract;

(2) That both the *employer* and employees have cancelled said contract;

(3) That by its own terms the alleged contract has terminated.

(b) That new and different contracts, not before the Court, have been entered into by the said Local Unions:

(1) That each said new contract for each said local union is a separate and distinct contract from that of any other said local union;

(2) That the employees were as of said date, thirteen (13) days prior to the hearing, operating under said new, separate and distinct contracts. (R. 156-157.)

It was also contended by defendants that if as petitioner appellant alleges in its complaint a labor dispute existed (R. 12) then the Court had no jurisdiction to issue an injunction by reason of the Norris-La Guardia Act, 47 Stats. 70, 29 USCA Secs. 101-115. (R. 145, 148.)

ARGUMENT.

THE DISTRICT COURT HAS NO JURISDICTION TO DETERMINE THE CONTROVERSY UNDER THE DECLARATORY JUDGMENT ACT OR ANY OTHER ACT AND THE DISTRICT COURT DID NOT ERR IN GRANTING THE MOTION TO DISMISS FILED BY THE NATIONAL LABOR RELATIONS BOARD.

Under the provisions of the National Labor Management Relations Act, 1947, it is an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer, provided it is a representative of his employees subject to the provision of section 9 (a)." NLMRA 1947, Sec. 8 (b) (3); 29 USCA, 158 (b) (3).

Section 9(a) provides:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *"

Section 9(b) provides:

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees

vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

We therefore find that before any order could be issued by the National Labor Relations Board that the Board must determine what the "appropriate unit" is.

But under Section 9(g):

"* * * No labor organization shall be eligible for certification under this section as the representative of any employees * * * unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection."

the complaint is silent as to whether or not the defendant council or unions have complied as required by law.

This, of course, is in addition to the fact that the National Labor Relations Board must also decide whether a "labor dispute" within the meaning of the Act (NLMRA Sec. 2 (9), 29 USCA 152 (9)), between the employer and his employees would "affect commerce" within the meaning of the Act (NLMRA Sec. 2 (7) 29 USCA 152 (7)).

Now insofar as Congress has given the National Labor Relations Board the jurisdiction to pass upon the existence or non-existence of the above facts, i.e. (a) appropriateness of the unit, (b) compliance by the union or Council, (c) whether a labor dispute between the employer and his employees would affect commerce within the meaning of the Act, the Board's power is exclusive.

Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893;

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 82 L. Ed. 639;

Newport News Shipbuilding & Drydock Co. v. Schauffler, 303 U.S. 54, 82 L. Ed. 646.

In the case of *Gerry of California v. Superior Court in and for Los Angeles County* (Cal. June 16, 1948), 194 P. (2d) 689, 32 Cal. (2d) 119, Justice Shenk reviewed fully the decisions of both state and federal Courts under the Labor Management Relations Act of 1947, and the following is quoted from his opinion, beginning on page 122:

"At the hearing the plaintiff agreed that the activities sought to be enjoined were peaceful and that there was no state law pursuant to which the

company could obtain equitable redress. The petitioner invokes sections 8(b) and 303 of the Labor Management Relations Act, 1947, as furnishing the law pursuant to which the respondent court must exercise the equity jurisdiction conferred by section 5 of Article VI of the state Constitution.

“For present purposes it will be sufficient, without setting out the specific provisions, to note that section 8(b) of the 1947 Act declares it to be an unfair labor practice affecting interstate commerce for a labor organization to engage in the concerted activities specified in the record. Accordingly it is assumed that the alleged activities on the part of the uncertified unions are unfair labor practices as designated by that section. Section 303(a) declares the same practices unlawful ‘for the purposes of this section only.’ Subsection (b) states: ‘Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States * * * or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.’

“(3-6) It is the petitioner’s argument that the state Courts have concurrent jurisdiction with the federal Courts to enforce rights created by a federal statute. Inasmuch as the laws of the United States are as binding on citizens and Courts as state laws, state Courts competent to exercise it have concurrent jurisdiction with the federal Courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction

creates the duty to exercise it. *Martin v. Hunter's Lessee*, 1816, 14 U.S. 304, 4 L.Ed. 97; *Claffin v. Houseman*, 1876, 93 U.S. 130, 23 L.Ed. 833; *Second Employers' Liability Cases*, (*Mondou v. New York, N. Y. & H. R. Co.*, 223 U.S. 1, 32 S. Ct. 169, 56 L.Ed. 327, 38 L.R.A., N.S., 44; *McKnett v. St. Louis & S.F.R. Co.*, 292 U.S. 230, 54 S. Ct. 690, 78 L.Ed. 1227. In *Bethlehem Steel Co. v. New York State Labor Relations Board*, April, 1947, 330 S. Ct. 767, 67 S. Ct. 1026, 1029, 91 L.Ed. 1234, it was recognized as a settled rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of that result be wanting citing *Napier v. Atlantic Coast Line R. Co.* 272 U.S. 605, 47 S. Ct. 207, 71 L.Ed. 432. At the same time the Supreme Court also pointed out that Congress had not seen fit to lay down even a general guide to the construction of the National Labor Relations Act as it sometimes does (referring to the Securities Act of 1933, §18, 48 Stat. 85, 15 U.S.C.A. §77r; Securities Exchange Act of 1934, §28, 48 Stat. 903, 15 U.S.C.A. § 78bb; United States Warehouse Act, § 29, 39 Stat. 490, 46 Stat. 1465, 7 U.S.C.A. § 269) by saying that its regulation either shall or shall not exclude state action. This Court has also recognized that when the question is whether a state Court may take jurisdiction of matters arising under a federal law inquiry is first directed to the intention of Congress in that regard. *Miller v. Municipal Court*, *supra*, 22 Cal. (2d) 818, 836, 142 P. (2d) 297. Therefore, whether concurrent state jurisdiction exists is a matter to be determined from a construction of the act itself.

“A proper conclusion depends in part upon the construction of the act before the 1947 amendments. Pursuant to section 10 of the National Labor Relations Act, 29 U.S.C.A. § 160, the National Labor Relations Board was empowered, upon issuing a complaint and notice, to conduct a hearing on a charge of employer unfair labor practices defined in the act and to issue a cease and desist order, together with orders for affirmative relief. Such orders were enforced by petition to the Circuit Court of Appeals which was empowered to conduct a hearing and render a decree (including temporary injunctive relief) enforcing, modifying and enforcing, or setting aside the order of the board. For the purposes of section 10, the limitations imposed by the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C.A. §§ 101-115, upon the issuance of restraining orders and injunctions in cases involving labor disputes were removed.

“By section 10 (a) before amendment the power thus reposed in the National Labor Relations Board was made ‘exclusive’ and not ‘affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise’. In *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264, 60 S. Ct. 561, 563, 84 L. Ed. 738, the Supreme Court said, with reference to providing the remedy for the specified unfair labor practices: ‘Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be

made effective.' The Supreme Court pointed out that the course of procedure was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair labor practice; that the board was chosen as the instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized. That section 10 of the National Labor Relations Act committed to the board the exclusive power to decide whether unfair labor practices by the employer had been engaged in and to determine the action that should be taken to remove or avoid the consequences thereof was again stated in *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, at page 365, 60 S. Ct. 569, at page 577, 84 L. Ed. 799. Also, *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 46, 47, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352, and *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 48-50, 58 S. Ct. 459, 82 L. Ed. 638, upheld as constitutional the vesting of the exclusive power in the board. The most recent pronouncement of the Supreme Court to come to our attention is in *Bethlehem Steel Co. v. New York State Labor Relations Board*, *supra*, 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234, reversing 295 N.Y. 601 and 607, 64 N.E. (2d) 350, wherein it was held that state and federal action covering the subject

matter of the National Labor Relations Act would not co-exist. Similarly in *Blankenship v. Kurfman*, 1938, 7 Cir., 96 F. (2d) 450, 454, it was held that the National Labor Relations Act might not be construed as intending to create rights for employees which could be enforced in federal Courts independently of action by the National Labor Relations Board; that it was clear that the only rights which were made enforceable by the Act were those which had been determined by the board to exist under the facts of each case, and that when determined the method of enforcing them provided by the Act must be followed. In *Fur Workers Union, Local 72 v. Fur Workers Union*, 70 App. D. C. 122, 105 F. (2d) 1, with reliance on the *Blankenship* case, such double jurisdiction was likewise held to be contrary to the intent manifested by the provisions of the National Labor Relations Act. See also *Styles v. Local 74*, D. C. 74 F. Supp. 499.

“The Supreme Court of the United States has also recognized the application of the ‘long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted’—referring to the application to the National Labor Relations Board for determination of the factual issues and the appropriate relief designated in the National Labor Relations Act. *Myers v. Bethlehem Corporation*, supra, 303 U. S. at pages 50, 51, citing numerous cases; see also, *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U. S. 54, 58

S. Ct. 466, 82 L. Ed. 646; *United Brick & Clay Workers v. Junction City Clay Co.*, 6 Cir., 158 F. 2d 552; *Steinberg v. Lebus*, D. C., 71 F. Supp. 121, 124."

* * * * *

"As noted, the National Labor Relations Act before its amendment by the 1947 Act did not define or place within the scope of the National Labor Relations Board's jurisdiction unfair labor practices on the part of labor organizations. By section 8 (b) of the 1947 Act the conduct charged to the defendant unions in this case is declared to be unfair labor practices.

"Prior to the 1947 amendment the powers of the board under section 10 of the act were limited to the issuance of cease and desist orders against employers, after investigation and hearing, and the enforcement thereof by petition to the Circuit Court of Appeals for injunction and other process. Concurrently with the inclusion by the 1947 Act of declared unfair labor practices by labor organizations (section 8 (b)), Congress deemed it expedient to provide accelerated means for obtaining injunctive orders. Under the 1947 Act a temporary restraining order may be obtained after the issuance of *a complaint by the board as to any unfair labor practice*, by petition filed in the United States District Court, upon notice and hearing (sec. 10(j)). In certain cases of unfair labor practices by labor organizations designated in section 8(b), the duty to apply for temporary injunctive relief is mandatory whenever preliminary investigation by the board indicates reasonable cause for belief that the charge is true (sec. 10(1)). Section 10(h) removes the restrictions

and limitations upon the equity jurisdiction of United States Courts imposed by the Norris-LaGuardia Act insofar as action by the National Labor Relations Board is concerned. See *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, March 15, 1948, 333 U.S. 437, 68 S. Ct. 630.

“The provision of section 303(a) of the 1947 Act restricting the unlawfulness there declared to the purposes of that section discloses an intent not to authorize criminal prosecutions for the commission of the specified unfair labor practices by labor organizations. The section then permits suits in district courts of the United States and other courts having jurisdiction of the parties for the recovery of damages occurring from the ‘unlawful’ acts on the part of labor organizations. This is the only jurisdiction over suits by private parties which is expressly recognized by the act. In designating the nature of the board’s power in section 10(a) of the 1947 Act, Congress omitted the word ‘exclusive’ from the National Relations Act. The petitioner argues that the omission implies an intent to permit injunctive relief as well as damages at the suit of parties injured by the designated unfair labor practices committed by labor organizations. But in amending that section to eliminate the word ‘exclusive,’ Congress also added a proviso empowering the National Labor Relations Board by agreement to cede to state agencies jurisdiction in any industry (with certain exceptions) although a labor dispute affecting interstate commerce was involved, where the local regulatory provisions were consistent with the federal act. The word ‘exclusive’ would be inconsistent with the exercise

of ceded power by agencies created pursuant to the state regulatory legislation invited by the proviso.

“(8) The provisions of the 1947 Act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. This intent is also indicated by the record of the conference and committee reports and congressional debates.

“The pertinent portions of those reports and debates were reviewed by the Fourth Circuit Court of Appeals in *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 167 F. (2d) 183, 188. The appeal in that case involved the jurisdiction of the federal district court under the National Labor Relations Act as amended by the 1947 Act to issue an injunctive order at the suit of a labor organization. A mandatory injunction theretofore issued by the District Court required the employer to bargain collectively with a union of its employees. It was concluded that the history of the National Labor Relations Act and the decisions rendered thereunder made it clear that the purpose of the act was to establish a single paramount administrative authority in connection with the development of federal law regarding collective bargaining; that the only rights made enforceable were those determined by the National Labor Relations Board to exist under the facts of each case; that there was nothing in the text or the history of the enactment of

the 1947 Act which indicated a departure from the foregoing purposes or policies, or showed any intention to vest jurisdiction in the courts except to the limited extent that jurisdiction was expressly conferred; that only under section 303 was jurisdiction given to entertain actions brought by private parties and then only to render judgments for damages arising out of jurisdictional strikes and boycotts. That court also reached the conclusion from a study of the new act and the conference reports that the purpose of omitting the word 'exclusive' from section 10(a) of the National Labor Relations Act was merely to synchronize with the power reposed in the board the added elements of jurisdiction expressly vested in the courts and which may be ceded to state agencies under the 1947 proviso of said section. The court said: 'There is nothing in the history of the act, the reports of committees or the debates in Congress which even vaguely supports the contention that its effect was to vest jurisdiction in the District Courts to grant relief against unfair labor practices. Everything said by anyone remotely bearing on the matter is to the contrary. * * * It is hardly thinkable that, if the effect of the Labor Management Relations Act was to make a fundamental change in the jurisdiction to deal with unfair labor practices, this important fact would not have dawned upon some member of the House or the Senate and have been referred to in the course of the lengthy debate of a measure that was passed over a Presidential veto. That no such suggestion was made gives ample support to the interpretation which, as we have already indicated, we would

place upon the text of the act if the history of its passage and Congressional debates were not available to us.' The court mentioned cases in trial courts where injunctive relief had been denied (*Douds v. Wine, Liquor & Distillery Workers Union*, D.C., 75 F. Supp. 477; *Fitzgerald v. Douds*, D.C., 76 F. Supp. 597, Southern District of New York; and the present case), and referred to the disastrous consequences to any successful administration of the labor law, and the repugnance to the orderly administration of justice, if courts should take coordinate jurisdiction with the National Labor Relations Board to restrain unfair labor practices. The court also noted the absurdity which would result from unauthorized court actions at the suit of labor organizations, since Congress clearly intended to withhold redress on a charge of unfair labor practices made by a labor organization unless the latter had filed certain financial statements and affidavits (sec. 9(f), (g), (h)). Not overlooked was the possibility that unusual cases might arise where courts of equity could be called upon to protect the rights created by the act. But the court recognized that the case involved nothing out of the ordinary, that the procedure before the board provided an adequate administrative remedy, and that the extraordinary powers of a court of equity could not be invoked until the administrative remedy had been exhausted, citing *Newport News Shipbuilding v. Dry Dock Co. v. Schauffler*, 4 Cir., 91 F. (2d) 730, affirmed *supra*, 303 U.S. 54, 58 S. Ct. 466, 82 L. Ed. 646. No question is here presented as to what the situation would be if the petitioner had exhausted its administrative remedy.

“(9) The reasons for concluding that express jurisdiction was not conferred on federal trial courts at the suit of a private party to restrain alleged unfair labor practices, as held in the Amazon Cotton Mill Co. case, likewise compel the conclusion that the nature and purpose of the act preclude state action in the field of the jurisdiction vested in the National Labor Relations Board except to the extent that it has been expressly conferred or ceded, and that this is so whether such action be initiated by an employer or by a labor organization. General language in *Park & Tilford Import Corporation v. International, etc., of Teamsters*, supra, 27 Cal. (2d) at page 604 et seq., 165 P. (2d) at page 894, and *Lilleflore v. Superior Court*, 31 Cal. (2d), 189 P. (2d) 265, indicating that the state courts might enjoin union activities affecting interstate commerce if engaged in for an unlawful purpose is not controlling here. It is necessarily restricted to the period prior to the effective date of the 1947 Act when no administrative remedy was afforded to prevent unfair labor practices on the part of labor organizations.”

See also

Keller v. American Cyanamid Company, New Jersey, Chancery Court (1942), 6 Labor Cases 63630;

Manning v. Feidelson, 175 Tenn. 576, 136 S.W. (2d) 510;

Fidelity Union Trust Company v. Ackerman, 121 N.J. Eq. 497, 191 Atl. 813;

Oliver v. Local or Subordinate Lodge No. 656 (Tenn. 1944), 185 S.W. (2d) 525, 9 Labor Cases 67044;

Fedor Tepco Employees' Union v. The Enamel Products Co. (Ohio 1940), 2 Labor Cases 1008;

Sanco Piece Dye Works v. Herrick, 33 Fed. Supp. 80.

The case of *Manning v. Feidelson*, 175 Tenn. 576, 136 S.W. (2d) 510, is directly in point, and Judge McKinney, delivering the opinion of the Court said:

“This Labor Board is a Federal agency created for the purpose of regulating commerce between the states. This is an exclusive power vested in Congress by the Constitution, and the states may not regulate such commerce in any manner. U.S. Const., Art. I, sec. 8, cl. 3, 12 C.J. 12; *Hannibal & St. Joseph R. Co. v. Hudson*, 95 U.S. 465, 469, 24 L. Ed. 527; *Crutcher v. Commonwealth of Kentucky*, 141 U.S., 47, 59, 60, 11 S. Ct. 851, 35 L. Ed., 649; *Brennan v. City of Titusville*, 153 U.S., 289, 301, 14 S. Ct., 829, 38 L. Ed., 719. It seems to us that the purpose of this Act is the same as that of the Interstate Commerce Act, 49 U.S.C.A., section 1 *et seq.*, both being created for the purpose of regulating interstate commerce.”

In addition to the foregoing cases it was said in the case of *Montgomery Ward Employees Ass'n v. Retail Clerks International Protective Ass'n*, 38 Fed. Supp. 321-322:

“If this court were to inject itself into the present controversy, it would seize powers of the National Labor Relations Board. If plaintiff organization won the right to prevent picketing or any otherwise lawful activities of a labor organization

by reason of the filing of the petition, the Court in granting those rights to such organization must accept the contention that it represents some, if not a majority of the Company's employees. It is in fact asked to enjoin these organizations from attempting to bargain with the employer although the unions are so entitled unless and until it is found they do not represent a majority of the employees. Yet it is the Board, not the Court which must determine this question. The very issue which the Board resolves is the matter of representation. The Court is not empowered to determine it."

It has been held in the following cases that both federal and state decisions establish the rule that the National Labor Relations Act confers "exclusive initial jurisdiction upon the Board" to determine the facts upon the existence of which depends the duty of the employer to bargain collectively with the union as the representative of all the employees and the right of a union to bind all the employees to a union shop contract.

Stone Logging & Contracting Co. v. International Woodworkers of America, 135 Pac. (2d) 759 (Oregon);

Montgomery Ward Employees Ass'n v. Retail Clerks International Protective Ass'n, 38 Fed. Supp. 321-322;

Cleveland CC & St. L. Ry. Co. v. U. S., 275 U.S. 404, 72 L. Ed. 338;

Hill v. State of Florida ex rel. Watson, 325 U.S. 538, 89 L. Ed.

In the case of *United Brick and Clay Workers of America v. Junction City Clay Company* (6 C.C.A.), 158 Fed. (2d) 552, an action was brought by the United Brick and Clay Workers of America against the Junction City Clay Company and others for an injunction ordering the defendants to cease from further acts in furtherance of alleged violation of the National Labor Relations Act. This action was commenced in the District Court for the Southern District of Ohio and from a judgment dismissing the action the plaintiff appealed. The Circuit Court of Appeals, in passing on the action of the District Court in dismissing the petition for injunction said:

“We think the order of the District Court dismissing the petition is clearly correct for two reasons, either of which compels affirmance of the order. Violations of the National Labor Relations Act *lie within the exclusive jurisdiction* of the National Labor Relations Board, under Sec. 10 (a) of the Act, and hence the District Court has no jurisdiction of the subject-matter of the action. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 58 S. Ct. 466, 82 L. Ed. 646; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 50, 58 S. Ct. 459, 82 L. Ed. 638.

“The petition does not state a cause of action. The appellant has an adequate remedy before the National Labor Relations Board which it has failed to exhaust. Sec. 10 (a), National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., 29 U.S.C.A. Sec. 151 et seq. This is an insuperable obstacle to the maintenance of the action in this court. *Myers v. Bethlehem Shipbuilding Corp.*,

supra, 303 U.S. 41 at pages 50, 51, 58 S. Ct. 459, 82 L. Ed. 638; *Madden v. Brotherhood and Union of Transit Employees of Baltimore*, 4 Cir., 147 F. (2d) 439." (Italics ours.)

It is also apparent that the plaintiffs have not exhausted their administrative remedy.

Abelleiro v. Dist. Court of Appeals, 17 Cal. (2d) 280;

International Brotherhood of Teamsters v. International Union of United Brewery, etc., 106 Fed. (2d) 871;

Fedor v. Enamel Prod. Co., 2 Labor Cases 1008; *Keller v. American Cyanamid Company*, 6 Labor Cases 63630;

Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41-58, 86 L. Ed. 638.

An injunction will not issue except where the plaintiff has no other adequate remedy and the threatened injury is irreparable.

Kredo v. Phelps, 145 Cal. 526;

Fedor v. Enamel Prod. Co., 2 Labor Cases 1008;

Keller v. American Cyanamid Company, 6 Labor Cases 63630.

However, in addition to the cases above referred to this Court definitely decided in *International Brotherhood, etc. v. International Union, etc.*, 106 Fed. (2d) 871, that an action in the Federal Court for declaratory relief determining issues over which the National Labor Relations Board has jurisdiction is improper.

THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEVADA, HAD NO JURISDICTION TO ISSUE A PRELIMINARY INJUNCTION PENDENTE LITE, A LABOR DISPUTE BEING PRESENT AND THE NORRIS-LA GUARDIA ACT BEING APPLICABLE.

That a "labor dispute" exists and that the jurisdiction of the District Court is limited by the Norris-LaGuardia Act, 47 Stats. 70, 29 USCA Sec. 101, et seq., is likewise clear from *International Brotherhood, etc. v. International Union, etc.*, (supra).

Columbia River Packers Association, Inc. v. Hinton, 315 U.S. 143, 86 L. Ed. 750, 62 S. Ct. 520, has no application to the facts of the instant case. The Court in that case held that the alleged "union" was not a labor union but an association of business men similar to petitioner appellant. There is no such allegation in petitioner's complaint (R. 2-44), in fact, the opposite appears, namely that the dispute is between employers and employees and the labor unions of which the employees are members.

Bakery Sales Drivers Union No. 33 v. Wagshal, 33 U.S. 437, 68 S. Ct. 630, 92 L. Ed. 792, does not support appellant's position that a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 USCA 101, et seq., is not set out in appellant's petition.

The portion of the opinion quoted by appellant (App. Br. 12) should not be taken from its contents. The full quotation is as follows:

"The controversy over the hour of delivery. The petitioners claim that this was a dispute 'concerning terms or conditions of (the driver's employment)' thereby raising a labor dispute,

'whether or not the disputants stand in the proximate relation of employer and employee.' Section 13(c) of the Norris-LaGuardia Act. But the respondent had nothing to do with the working conditions of Hinkle's employees, individually or collectively. Her only desire was to have the bread come at an hour suitable for her business, and she had no interest in what arrangements Hinkle made to satisfy that desire rather than run the risk of losing her trade—to have the bread delivered by the same driver at a different hour, or by another driver, by an independent contractor, or through some other resourceful contrivance. To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, equality, delivery, payment, credit, or any other business transaction into a 'labor dispute.' *CF. Columbia River Packers Assn. v. Hinton*, 315 U.S. 143, 86 L. Ed. 750, 62 S. Ct. 520. Furthermore, on the basis of what we have before us, respondent's disagreement with Hinkle over the delivery hour was a dead controversy, not involved in the subsequent dispute with the union, or in the boycott against which the injunction was directed."

Appellant states:

"The Norris-LaGuardia Act would be applicable if, and only if, appellant is engaged in, or affecting interstate commerce. The court ex necessitate assumed that very issue to arrive at its decision." (App. Br. 13.)

The Norris-LaGuardia Act is not so limited.

The question of whether or not a labor dispute does or does not affect commerce is not a condition precedent to the applicability of the Norris-LaGuardia Act. (29 USCA 101, et seq.)

In *Bakery Sales Drivers Union No. 33 v. Wagshal* (supra), the Court says:

“The short answer to the argument that the Labor Management Relations Act of (June 23) 1947, PL 101, 80th Cong. 1st Sess. § 10(h), 61 Stat. 136, 146, c 120, 29 USCA § 160(h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party.”

The case of *United States v. United Mine Workers*, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677, has no application here. The defendants complied with the temporary restraining order until the District Court had an opportunity to determine its own jurisdiction. The United Mine Workers did not.

Appellants state:

“Even if it be assumed that a ‘labor dispute’ existed within the defined meaning of the Norris-LaGuardia Act, the District Court, upon making necessary findings of fact, could have granted an injunction. 29 U.S.C.A., Sec. 107.” (App. Br. 14.)

There are no allegations in the complaint (R. 2 et seq.) that:

“(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

“(b) That substantial and irreparable injury to complainant’s property will follow;

“(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

“(d) That complainant has no adequate remedy at law; and

“(e) That the public officers charged with the duty to protect complainant’s property are unable or unwilling to furnish adequate protection.” 29 U.S.C.A. 107.

There was no testimony regarding any of the above offered by the appellant and consequently unless the Court was ready and willing to itself violate the act and its oath no such findings could be made. (29 U.S.C.A. 107.)

We submit the District Court in the instant case would not so stultify its honor, and suggest that the statement by the appellants was made without any real understanding of its implication or of the provisions of the Norris-LaGuardia Act.

Appellant states:

“Appellant’s theory herein has been, and now is, that there existed no ‘labor dispute’ and, therefore, the Norris-LaGuardia Act was inapplicable.” (App. Br. 15.)

But appellant alleges in his complaint:

“* * * that your petitioner is informed and believes and therefore alleges the fact to be *that the position of respondents whereby they have contended throughout their negotiations that they are not covered by said Labor Management Relations Act of 1947 is not in good faith, but is a subterfuge for the purpose of coercing the petitioner into complying with the original demands for an amendment to said agreement under the master agreement, particularly in regard to wages for the reason that throughout the entire negotiations aforesaid respondents have made the same wage demands, and it is therefore the belief of your petitioner that said collective bargaining has not been in good faith on the part of respondents, and is merely a subterfuge to compel the petitioner and its members to meet such increased wage demands or to be subjected to economic coercion by reason of (10) strikes, slow downs and other tactics normally employed by such unions under such circumstances.*” (R. 11-12.) (Italics ours.)

This portion appellant refused to strike from its complaint. (R. 171.)

That a labor dispute regarding wages existed, is a fact. No Court is going to close its eyes to the facts

in order to support a theory which must fail once the facts are known. Such, however, is the request of appellant here.

THE APPEAL SHOULD BE DISMISSED BECAUSE THE GROUNDS UPON WHICH IT IS FOUNDED ARE NOW MOOT. NO ACTUAL CONTROVERSY EXISTS AND THE COMPLAINT DOES NOT ALLEGE AN ACTUAL CONTROVERSY.

Respondents, with the exception of the respondent Local Union of Operating Engineers No. 3, filed motion to dismiss the complaint upon the above stated grounds. See Transcript of Record, pp. 155 to 157, both inclusive.

It will be noted that attached to the motion was the affidavit of the Secretary of the Building Trades Council of Reno wherein, under oath, he states among other things:

“None of the said Unions, individually or as a group, are employed under or by virtue of the terms of said contract, and no members of any of said Unions are being paid or employed by reason and by virtue of said contract; that both employers and employees have cancelled said contract and that the said contract, by its own terms and by reason of notices given, has been cancelled or is terminated.” (R. 157.)

No further or other affidavits are contained in the Transcript of Record, particularly in opposition to the affidavit from which the above quotation is taken.

During the argument of September 16, 1948, wherein the motion of respondents was presented to

the Honorable District Court, the motion to dismiss on the grounds that the question was moot was referred to several times, but no decision was rendered by the lower Court. (R. 166, 169, 175-178.) Also counsel for the appellant admitted the correctness of the affidavit. (R. 168, 169). Also statement of Mr. Griswold (R. 175-178) wherein, among other things, it was stated, and not denied, as follows, p. 177:

“Now the complaint itself, may it please the Court, states that the contract which is the basis of the complaint was discontinued on May 21st and would be discontinued unless your Honor had restrained it, and then the complaint says that these people, the unions, are the proper parties to bargain on wages and hours.”

The record shows that the complaint on file in this action prays for an advisory opinion only and for legal advice on a contract that not only expired by its own terms but has also terminated by the acts of the parties.

The record shows that there are no issues to be determined or settled between the parties hereto for the reason that the contract alleged in the complaint filed herein has by its own terms expired and by the acts of the parties has been cancelled, and new contracts entered into by the parties. Therefore, any decision in this case would settle nothing as there is no actual or existing controversy between the parties arising from the contract.

The question of mootness and the lack of a justiciable controversy may be considered at any time. The

Supreme Court in the recent case of *Oklahoma v. U. S. Civil Service Commission*, 330 U.S. 127, 91 L. Ed. 794, said that such an objection questions the judicial power to act and may be raised for the first time in that Court. The following is quoted from the opinion of the Court:

“* * *, if the contention is treated as meaning that no justiciable controversy as to the constitutionality of Sec. 12(a) exists because petitioner suffers no injury which it may protect legally from the withdrawal by the U.S. of a portion of a grant in aid, the objection, as it questions *judicial power to act on this point*, is timely although first made in this Court.” (Italics supplied.)

The rule that where an existing controversy has come to an end, either by an act of the parties, or by operation of law, the case becomes moot and should be dismissed, is well established by a long line of decisions of the United States Supreme Court. These decisions are collected and cited in the case of *The Aussa*, 52 Fed. Supp. 927, wherein on page 930 the Court said:

“It is well established that where, as here, the existing controversy has come to an end, *either by an act of the parties or by operation of law, the case becomes moot and should be dismissed.* Duke Power Co. v. Greenwood County, 299 U. S. 259, 267; 57 S. Ct. 202; 81 L. Ed. 178; U. S. v. Anchor Coal Co., 279 U. S. 812; 49 S. Ct. 262; 73 L. Ed. 971; Brownlow v. Schwartz, 261 U. S. 216, 217; 43 S. Ct. 263; 67 L. Ed. 620; Hertmueller v. Stokes, 256 U. S. 359, 361; 41 S. Ct. 522; 65 L. Ed. 990; U. S. v. Alaska S. S. Co., 253 U. S.

113, 116; 40 S. Ct. 448, 64 L. Ed. 808; U. S. v. Hamburg-Americanishe, etc., Co., 239 U. S. 466, 475; 36 S. Ct. 212; 60 L. Ed. 387; Cover v. Schwartz, 2 Cir., 133 Fed. 2d 541, 546; Spreckels Sugar Co. v. Wickard, 75 U. S. App. D. C. 44, 131 Fed. 2d 12, 14; Otis v. International Mercantile Marine Co., 9 Cir., 95 Fed. 2d 539, 541."

In the case of *Walling v. Shenandoah-Dives Mining Co.* (CCA Colorado) 134 Fed. (2d) 395, 396, the Court said:

"When in course of a trial the matter in controversy comes to an end, either by an act of one or both of the parties, or by operation of law, the question becomes 'moot'."

In distinguishing between cases involving actual controversies and those calling for an advisory decree upon a hypothetical statement of facts the Supreme Court in the case of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688, said:

"The act of June 14, 1934, providing for declaratory judgments does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to 'cases of actual controversy', a phrase which must be taken to connote a controversy of justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts. See *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 A. L. R. 1191, *supra*."

Petition for rehearing was denied March 2, 1936, 80 L. Ed. 1011.

In the case of *Keely v. Ophir Hill Consol. Mining Co., et al.* (CCA 8th), 169 Fed. 601, a motion to dismiss the appeal on the ground that the question had become "moot" was sustained in a well considered opinion. The Court held that it may take knowledge of facts appearing *aliunde* the record which discloses the moot character of a question presented to it and decline to enter upon its consideration. In considering the procedure to be followed when it had been made to appear that the question involved had become moot, the Court said:

"Nevertheless it is certain that the only issue now before us has been actually and finally adjudicated by a court of competent jurisdiction. The present record and the record in the action at law which has just been before us conclusively show this. *Must we shut our eyes to these obvious facts and sagely proceed to an idle and bootless investigation and to a determination of a mere moot question?* The forms of a judicial procedure are not so unyielding as to require us to do this vain thing. In the case of *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, the Supreme Court passed upon a motion to dismiss an appeal because no actual controversy existed. It there said:

"*'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'*

“To the same effect are *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 11 Sup. Ct. 4, 34 L. Ed. 572; *Kimball v. Kimball*, 174 U. S. 158, 19 Sup. Ct. 639, 43 L. Ed. 932; *Tennessee v. Condon*, 189 U. S. 64, 23 Sup. Ct. 579, 47 L. Ed. 709; *In re James Lincoln*, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984; *Faucher v. Grass*, 60 Iowa 505, 15 N. W. 302; *Board of Freeholders v. Board of Freeholders*, 44 N. J. Law 438; *Blythe Estate*, 102 Cal. 350, 37 Pac. 392.

“The court may take knowledge of facts appearing aliunde the record which disclose the moot character of a question presented to it and decline to enter upon its consideration. *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93; *Lord v. Veazie*, 8 How. 251, 254, 12 L. Ed. 1067; *Wood-Paper Co. v. Heft*, 8 Wall. 333; 336, 19 L. Ed. 379; *Dakota County v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981; *Butler v. Eaton*, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713; *Kimball v. Kimball* and *In re James Lincoln*, *supra*.” (Italics supplied.)

In the last mentioned case the Court in support of its decision quoted the following from the case of *Kimball v. Kimball*, 174 U. S. 158, 19 Sup. Ct. 639, 43 L. Ed. 932:

“From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its rights and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence.”

The case of *In re James Lincoln*, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984, was also quoted from,

wherein the Supreme Court, after adverting to several other cases said:

“In each of which, intermediate the ruling below and the time for decision here, events had happened which prevented the granting of the relief sought, and the appeals or writs of error were dismissed on the ground that this court did not spend its time deciding a moot case.”

The case of *Morris Plan Bank of Ft. Worth v. Ogden* (Texas), 144 S. W. (2d) 998, is very much in point. In that case the relief sought was the cancellation of a lease which had already been cancelled, where in the case now before this Honorable Court the relief sought is an advisory opinion on a contract which has already been terminated by its own terms and by the acts of the parties. On page 1004 the Court said:

“A case is said to be a ‘moot case’ when the question to be determined is ‘abstract’. The case is clearly a ‘moot case’ when the sole relief sought is the cancellation of a lease which already has been cancelled.”

In *Diedricksen v. Sutch* (Cal.), 118 Pac. (2d) 863, the Court said:

“Questions involved in an appeal may become moot by reason of the acts of the legislature, of *the parties*, or by lapse of time.” (Italics supplied.)

In *Chicago City Bank & Trust Co. v. Board of Education of City of Chicago*, 54 N. E. (2d) 498, 503, 386 Ill. 508, it was held:

“A question is ‘moot’, requiring dismissal of appeal, when it involves no actual controversy, interests, or rights of parties, or when issues have ceased to exist.”

In the case of *McDonald v. Brewery & Beverage Drivers & Helpers and Warehousemen Local Union No. 792*, 9 N. W. (2d) 770, 772, 215 Minn. 274, it was held that the termination of a contract caused the question of breach of the contract to become a moot question.

In the case of *Walling v. Lacy*, D. C. Colo., 51 Fed. Supp. 1002, it was held.

“Where, in the course of proceedings in a litigated matter, the controversy between the parties has come to an end *by the act of either*, the question is ‘moot’.”

The case of *Mountain States Beet Growers Marketing Association v. Wagner* (Colorado 1926), 247 Pac. 804, is another case which is very much in point. In this case plaintiff brought suit in March, 1925, to annul his contract (a co-operative marketing contract) and enjoin its enforcement for that year. The contract between the association and grower was unlimited as to time, but contained a provision that either party might cancel it by written notice given on or before November 1 of any year. The Court found the contract void but did not expressly cancel it. A decree was ordered on March 31 and entered May 5, 1925, enjoining its enforcement for the year 1925. The appellate court in its opinion said:

“The cause did not reach an issue here until December 27, 1925. It was orally argued and reversed. A re-hearing was granted, additional briefs filed, and it was again orally argued. Not until final consideration did it appear to the court, as now seems certain, *that the cause is moot*. Neither side suggested the point; otherwise the writ would have been dismissed in the first instance.” (Italics supplied.)

In the same case it was further said:

“The season of 1925 had passed before this cause reached us. There was neither contract nor crop for that year upon which a judgment could operate. When no judgment rendered can be carried into effect, the cause is moot and the courts will not consider it. *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *Keely v. Ophir Hill*, 169 Fed. 601, 605; *Nail v. McCullough*, 88 Okla. 243, 212 Pac. 981.”

In *New Discoveries v. Wisconsin Aluminum Research Foundation*, 13 Fed. Supp. 596, on page 598, the Court said:

“The insertion of the word ‘actual’ in the statute means that the court is to deal with realities, and not with an imaginary set of facts * * * The dispute between the parties, if any, is purely academic, and based upon a purely hypothetical statement of facts that are contingent, uncertain, and may never exist.”

On page 599 it is further stated:

“The court should not be asked to decide moot cases, give legal advice, or render an advisory opinion. The declaratory judgment statute was not enacted for that purpose.”

In *Aetna Cas. & Sur. Co. v. Quarles*, CCA (S. C. 1937), 92 Fed. (2d) 321, it was held: A declaratory judgment should be denied when another Court has jurisdiction of issue, where proceeding involving identical issues is already pending in another tribunal, *where special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances.*

In *Chicago Furniture Forwarding Co. v. Bowles* (CCA Ill. 1947), 161 Fed. (2d) 411, it was held that the District Court in dismissing action for declaratory relief is a proper exercise of discretion when it is apparent that it would serve no useful purpose.

In *Doehler Metal Furniture Co. v. Warren* (App. D. C. 1942), 129 Fed. (2d) 43, it was held that the District Court has discretion to dismiss action for declaratory judgment where it feels that not enough can be settled by the action.

In the case of *Imperial Irrigation District v. Nevada-California Electric Corp.* (CCA 9), 111 Fed (2d) 319, the parties entered into a stipulation that any judgment rendered in this case for declaratory relief would not be *res judicata* and the Court in holding that a decision could not be rendered on a moot question said:

“This stipulation specifically provides that any judgment thereon shall not be *res judicata*, and undertakes to request an opinion of the court upon a hypothetical question. The parties ask the court to assume and act upon the assumption that the plaintiff has title to the property involved, at the same time stipulating that no one is to be bound by the assumption.”

The case of *Ashwander v. Tennessee Valley Authority* was cited and quoted from in support of the decision in this case.

In the case of *State v. Jones* (Wyo.), 157 Pac. (2d) 993, the Court in considering the question of what the courts regard as a moot case, examined and cited with approval several cases which are quoted from its opinion:

“What do the courts regard as a moot case? As regards the matter at bar the concise statement of the Supreme Court of Colorado, in *Mountain States Beet Growers' Marketing Ass'n. v. Wagner*, 79 Colo. 604, 247 P. 804, would appear to supply as good a definition as could be framed. In that case the court said: ‘When no judgment rendered can be carried into effect, the cause is moot, and the courts will not consider it. *Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293; *Keely v. Ophir Hill*, 9 Cir., 169 F. 601, 605, 95 C. C. A. (96), 99; *Nail v. McCullough (& Lee)*, 88 Okl. 243, 212 P. 981.’

“Citing an extended list of decisions the Court of Appeals of Kentucky, in *Hudspeth v. Commonwealth*, 204 Ky. 606, 265 S. W. 18, more elaborately says: ‘It is the universal rule that courts will not consume their time in deciding abstract propositions of law or moot cases, and have no jurisdiction to do so. A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right, before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy. As falling within that category it is well established that

where, pending an appeal, an event occurs which makes a determination of the question unnecessary or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed.'

"To the same effect is the statement in *McNeill v. Hubert*, 119 Tex. 18, 23 S. W. 2d 331, 333: 'A case becomes moot when it appears that one seeks to obtain a judgment upon some pretended controversy when in reality none exists, or when he seeks judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. *City of Dallas v. Rutledge*, Tex. Civ. App., 258 S. W. 534, 537; *Adams v. Union R. Co.*, 21 R. I. 134, 42 A. 515, 517, 44 L. R. A. 273; *State v. Dolley*, 82 Kan. 533, 108 P. 846. Courts do not sit for the purpose of expounding the law upon abstract questions, but to determine the rights of litigants by the rendition of effective judgment. *Ex parte Steele*, D. C., 162 F. 694.'

"It is also indicated in *Diedricksen v. Sutch*, 47 Cal. App. 2d 646, 118 P. 2d 863, 865, that: 'Questions involved in an appeal may become moot by reason of the acts of the legislature, of the parties, or by lapse of time.' "

The respondents should prevail in this appeal and it should be dismissed because the grounds upon which the action is founded and this appeal is taken are now, and at the time of the hearing before the lower court on September 16, 1948, were moot. No actual controversy exists and the complaint does not allege an actual controversy. Appellant herein is asking for nothing more than an advisory opinion, no actual controversy being present, or alleged in the pleadings

which is ripe for judicial determination. The action, therefore, does not come within the purview of the Declaratory Judgment Act.

The Declaratory Judgment statute § 274(d) of the Judicial Code, 28 U.S.C.A. 400, is procedural and provides an additional remedy in cases, *only where the Federal Courts already have jurisdiction*. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc.*, 137 Fed. (2d) 176, affirmed 64 S. Ct. 1257, 322 U.S. 771, 88 L. Ed. 1596, the Court, on page 179, column 2, said:

*"This is a procedural statute that provides an additional remedy for use in cases of which the federal courts already have jurisdiction. * * ** The courts are limited in their jurisdiction to cases of actual controversy of a justiciable nature, *thus* excluding an advisory decree." (Italics supplied.)

In the foregoing case there was an actual controversy in which both sides joined in the petition for a judicial declaration of the legal rights and legal relations of the parties. The parties agreed that if the issue as to working time should be determined against appellants, the Court should then determine whether or not the employees were entitled to recover and, if so, how much. The Court further stated:

"A declaratory judgment is for the purpose of finally settling an actual controversy, and ordinarily should not be entered if it will not do so." (Italics supplied.)

On page 180, column 2, the Court said:

"We cannot enter advisory judgments upon hypothetical facts. The declaratory judgments

procedure does not change the essential requisites for the exercise of judicial power. The courts are limited in their jurisdiction to cases of actual controversy of a justiciable nature." (Italics supplied.)

The contract involved in the case now before this Court having expired by its own terms and also by the acts of the parties, what substantive right is available thereunder to the appellant herein? In the case of *Hargrove v. American Cent. Ins. Co.* (10 CCA), 1942, 125 Fed. (2d) 225, the Court, on page 228, column 1, in rendering its opinion on the Declaratory Judgment Act, said:

"It affords a complete and expeditious remedy whereby a party to a justiciable controversy may affirmatively assert any substantive right otherwise available to it in a civil action." (Italics supplied.)

The Declaratory Judgment Act is merely procedural, which provides *an additional remedy for use in those controversies of which the District Courts already have jurisdiction.*

American Chemical Paint Co. v. Dow Chemical Co. (CCA Mich., 1947), 161 Fed. (2d) 956;
Magic Foam Sales Corp. v. Mystic Foam Corp. (CCA Ohio, 1948), 167 Fed. (2d) 88;
Guardian Life Ins. Co. of America v. Kortz (CCA Colo., 1945), 151 Fed. (2d) 582.

The Declaratory Judgment Act does not create new rights or increase or extend jurisdiction of courts.

Miles Laboratories v. Federal Trade Commission (1944), 140 Fed. (2d) 683, 78 U.S. App.

D.C. 326, certiorari denied 64 S. Ct. 1263, 322 U.S. 752, 88 L. Ed. 1582;

Chicago Pneumatic Tool Co. v. Biegler (CCA Pa. 1945), 151 Fed. (2d) 784.

This Honorable Court in the case of *West Publishing Co. v. M. C. Colgan*, 138 Fed. (2d) 320, said, at page 324:

“The Federal Declaratory Judgment Act was not a jurisdiction-conferring statute, but an act to establish a new procedure in the federal courts, remedial in its nature. *Mississippi Power & Light Co. v. City of Jackson*, 5 Cir., 116 F. 2d 924, 925; *Aetna Casualty & Surety Co. v. Quarles*, 4 Cir., 92 F. 2d 321, 323. ‘Thus the operation of the Declaratory Judgment Act is procedural only.’ *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240, 57 S. Ct. 461, 463, 81 L. Ed. 617, 108 A.L.R. 1000. As this court once said, in *Southern Pacific Co. v. McAdoo*, 9 Cir., 82 F. 2d 121, 122: ‘The Declaratory Judgment Act (Judicial Code § 274d, 28 U.S.C.A. § 400 and note) is limited in its operation to those cases which would be within the jurisdiction of the federal courts if affirmative relief were being sought (Cases cited.) The mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction.’ See, also *Borchard on Declaratory Judgments*, 2d Ed., p. 231, et seq., where, at p. 233, the author says, ‘It is an axiom that the Declaratory Judgment Act has not enlarged the jurisdiction of the courts over subject matter and parties, although it manifestly has opened to prospective defendants—and to plaintiffs at an early stage of the controversy—a right to petition for relief not heretofore possessed.’ In other words, the Federal Declaratory Judgment Act can apply

only to a cause which the district court might otherwise be empowered to hear and determine. This is not gainsaid by appellant."

The case of *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617, cited by appellant does not support the position taken by appellant. In that case there was an actual controversy arising out of contracts of insurance. On page 622 of the L. Ed. citation, the Court said:

"There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. * * * It was a claim of a present, specific right. * * * Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.

The Supreme Court in the foregoing case in defining the term "controversy" as used in the Declaratory Judgment Act, said, quoting from page 621 of the L. Ed. citation:

"A 'controversy in this sense must be one that is appropriate for judicial determination.' (Citing case.) 'A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is

academic or moot. U. S. v. Alaska S. S. Co., 253 U. S. 113, 116, 64 L. Ed. 808, 809, 40 S. Ct. 448. *The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. (Citing cases.) It must be a real and substantial controversy admitting of specific relief through a decree of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (Citing many Supreme Court decisions.)*" (Italics supplied.)

It is clear that the complaint filed herein by appellant and as amended in the District Court alleges a "labor dispute", otherwise no dispute is alleged and there exists no actual controversy between the parties involving the legal interests and legal relationships of the parties. Any judgment rendered thereon would not adjudicate any legal right, relationship or obligation of the parties.

The Congress has provided a specific remedy for appellant and that remedy must first be exhausted. This Honorable Court in the case of *International Brotherhood, etc. v. International Union, etc.*, 106 Fed. (2d) 871, said:

"* * * Here is a violent 'controversy' in all the producing units of a wide flung industry of the exact kind the National Labor Relations Act is purposed to settle. * * *

"Since both the Employees and the Brewery Workers Union and also the Breweries have an administrative tribunal established by Congress *for the specific purpose of determining the controversy concerning the bargaining agent, the de-*

cision of that tribunal, and not the federal court first should have been sought. Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 50, 58 S. Ct. 459, 82 L. Ed. 638. CF Fur Workers Union, Local No. 72, v. Fur Workers Union, No. 21238, 70 App. D. C. 122, 105 F. 2d 1, 12." (Italics supplied.)

CONCLUSION.

Respondents respectfully submit:

1. That an action for declaratory relief will not lie in the instant case;
2. That the Court in the instant case has no jurisdiction to grant an injunction *pendente lite* as requested by appellants by reason of the Norris-La Guardia Act;
3. That the action is moot.

Wherefore, respondents pray that the judgment be affirmed.

Dated, San Francisco, California,
May 16, 1949.

Respectfully submitted,

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No. 12150

**In the United States Court of Appeals
for the Ninth Circuit**

**CALIFORNIA ASSOCIATION OF EMPLOYERS, A CALIFORNIA
CORPORATION DOING BUSINESS UNDER THE FIRM
NAME AND STYLE OF RENO EMPLOYERS COUNCIL,
APPELLANT**

v.

**BUILDING AND CONSTRUCTION TRADES COUNCIL OF
RENO, NEVADA, AND VICINITY, ET AL., AND NATIONAL
LABOR RELATIONS BOARD, APPELLEES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEVADA**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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J. P. BRIEN

INDEX

	Page
Jurisdiction.....	1
Statement of the case.....	3
I. The complaint in the court below.....	3
II. The motions to dismiss.....	5
III. The proceedings in the District Court on the Board's motion to dismiss the complaint.....	8
Argument.....	10
Preliminary statement.....	10
I. The District Court was without jurisdiction of the subject matter of the action.....	13
A. The National Labor Relations Act vests the Board with exclusive primary jurisdiction to determine whether unfair labor practices have been com- mitted and to decide subsidiary questions such as whether the Act is applicable to particular persons or controversies.....	13
B. The Federal Declaratory Judgment Act does not con- fer upon District Courts concurrent jurisdiction with the Board to determine whether the National Labor Relations Act is applicable to particular persons or controversies.....	21
II. The complaint was properly dismissed because Appellant failed to exhaust the complete and adequate administra- tive remedy given by the governing statute.....	23
III. The complaint was properly dismissed because the contro- versy was not subject to final and definitive adjudication by the district court.....	25
Conclusion.....	26
Appendix.....	27

AUTHORITIES CITED

Cases:	
<i>Aetna Life Ins. Co. v. Haworth</i> , 300 U. S. 227.....	22, 25
<i>Aircraft & Diesel Equipment Corp. v. Hirsch</i> , 331 U. S. 752.....	24
<i>Alonzo v. Industrial Container Corp.</i> , 23 L. R. R. M. 2169 (N. Y. S. Ct., December 22, 1948).....	20
<i>Amalgamated Association v. Dixie Motor Coach Corp.</i> , 170 F. 2d 902 (C. A. 8).....	19
<i>Amalgamated Meat Cutters, Matter of</i> , 81 N. L. R. B., No. 164, decided March 1, 1949.....	11
<i>Amalgamated Utility Workers v. Consolidated Edison Co.</i> , 309 U. S. 261.....	14

Cases—Continued

	Page
<i>Amazon Cotton Mill Co. v. Textile Workers</i> , 167 F. 2d 183 (C. A. 4).....	9, 17
<i>American Federation of Labor v. N. L. R. B.</i> , 308 U. S. 401.....	15
<i>American Radio Assn., Matter of</i> , 82 N. L. R. B., No. 151, decided April 19, 1949.....	11
<i>Bakery Sales Drivers v. Wagshal</i> , 333 U. S. 437.....	19
<i>Bethlehem Steel Co. v. N. Y. S. L. R. B.</i> , 330 U. S. 767.....	14
<i>Blankenship v. Kurfman</i> , 96 F. 2d 450 (C. A. 7).....	14
<i>Bradley Lumber Co. v. N. L. R. B.</i> , 84 F. 2d 97 (C. A. 5), certiorari denied, 299 U. S. 559.....	22
<i>Carbide & Carbon Corp. v. Industrial Chemicals Co.</i> , 140 F. 2d 47 (C. A. 4).....	22
<i>Denver Bldg. & Construction Trades Council, Matter of</i> , 82 N. L. R. B., No. 5, 23 L. R. R. M. 1524, March 15, 1949, <i>ibid.</i> , 82 N. L. R. B., No. 137, 23 L. R. R. M. 1656, April 13, 1949.....	26
<i>De Silva, In re</i> , 23 L. R. R. M. 2085 (Ca. S. Ct., November 16, 1948).....	20
<i>Di Benedetto v. Morgenthau</i> , 148 F. 2d 223 (C. A. D. C.), certiorari dismissed, 326 U. S. 686.....	22
<i>Doehler Metal Furniture Co. v. Warren</i> , 129 F. 2d 43 (C. A. D. C.) certiorari denied, 317 U. S. 663.....	22
<i>Elliott v. American Mfg. Co.</i> , 138 F. 2d 678 (C. A. 5).....	24
<i>Evans v. I. T. U., et al.</i> , 76 F. Supp. 881 (D. Ind.).....	20
<i>Fitzgerald v. Douds</i> , 167 F. 2d 714 (C. A. 2).....	19, 24
<i>Florida v. Bellman</i> , 149 F. 2d 890 (C. A. 5).....	24
<i>Fur Workers v. Fur Workers</i> , 105 F. 2d 1 (C. A. D. C.), affirmed, 308 U. S. 522.....	14
<i>Gerry v. Superior Court</i> , 194 Pac. 2d 689, 22 L. R. R. M. 2279, (Cal. S. Ct., June 16, 1948).....	20
<i>Greenebaum Tanning Co. v. N. L. R. B.</i> , 129 F. 2d 487 (C. A. 7).....	15
<i>I. L. U. v. Sunset Line & Twine Co.</i> , 77 F. Supp. 119 (N. D. Cal.).....	19
<i>Industrial Commission of Utah v. N. L. R. B.</i> , 172 F. 2d 389 (C. A. 10).....	20
<i>International Brotherhood v. International Union</i> , 106 F. 2d 871 (C. A. 9).....	14, 15, 21
<i>International Union v. International Union</i> , — F. 2d —, 23 L. R. R. M. 2517 (C. A. 8, March 31, 1949).....	19
<i>Jones & Laughlin Steel Corp. v. United Mine Workers of America</i> , 159 F. 2d 18 (C. A. D. C.), certiorari denied, 331 U. S. 828.....	24
<i>LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board</i> , 336 U. S. 18.....	14
<i>Macauley v. Waterman Steamship Corp.</i> , 327 U. S. 540, n. 4.....	22, 24
<i>Madden v. Brotherhood</i> , 147 F. 2d 439 (C. A. 4).....	15
<i>Madden v. United Mine Workers</i> , 79 F. Supp. 616 (D. C. D. C.).....	20
<i>Miles Laboratories v. F. T. C.</i> , 140 F. 2d 683 (C. A. D. C.), certiorari denied, 322 U. S. 752.....	22, 24
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U. S. 41.....	14, 15, 24
<i>Nashville, C. & St. L. Ry. v. Wallace</i> , 288 U. S. 249.....	25
<i>N. L. R. B. v. Jones & Laughlin Steel Corp.</i> , 301 U. S. 1.....	14
<i>National Licorice Co. v. N. L. R. B.</i> , 309 U. S. 350.....	14

III

Cases—Continued

	Page
<i>National Maritime Union, Matter of</i> , 78 N. L. R. B. 971, <i>ibid.</i> , 82 N. L. R. B., No. 152, decided April 19, 1949.....	11, 12
<i>Newport News Shipbuilding & Drydock v. Schauffler</i> , 303 U. S. 54.....	15
<i>Packhouse Workers v. Wilson & Co.</i> , 80 F. Supp. 563 (N. D. Ill.).....	19
<i>Putnam v. Ickes</i> , 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612.....	22
<i>Shore v. Bldg. Trades Council</i> , 23 L. R. R. M. 2417 (C. A. 3, March 4, 1949).....	10
<i>Thompson Products, Inc. v. N. L. R. B.</i> , 133 F. 2d 637 (C. A. 6).....	15, 24
<i>United Brick & Clay Workers v. Junction City Clay Co.</i> , 158 F. 2d 552 (C. A. 6).....	14, 24
<i>United Brotherhood of Carpenters & Joiners of America v. Sperry</i> , 170 F. 2d 863 (C. A. 10).....	10
<i>United E. R. & M. Workers v. I. B. E. W.</i> , 115 F. 2d 488 (C. A. 2).....	14
<i>Utah Fuel Co. v. National Bituminous Coal Commission</i> , 101 F. 2d 426 (C. A. D. C.), affirmed on other grounds, 306 U. S. 56.....	22
<i>Washington Terminal Co. v. Boswell</i> , 124 F. 2d 235 (C. A. D. C.), affirmed, 319 U. S. 732.....	24

Statutes:

Constitution:	
Article I, Section 8, Clause 3.....	2
Declaratory Judgment Act (28 U. S. C., Sec. 400); now, 28 U. S. C., Secs. 2201, 2202.....	2, 21
Judicial Code (28 U. S. C., Sec. 1337), Sec. 24 (8).....	2
Labor Management Relations Act (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 et seq.).....	16, 17
Title II.....	16
Section 208 (a).....	16, 18, 36
Title III.....	16, 37
Section 301 (a).....	17, 37
Section 302 (a).....	37
Section 302 (b).....	37
Section 302 (e).....	17, 37
Section 303 (a).....	19, 38
Section 303 (b).....	17, 18, 39
National Labor Relations Act (49 Stat. 449, 29 U. S. C., Secs. 151 et seq.).....	13, 27
Section 8.....	13
Section 10 (a).....	13, 27
Section 10 (e).....	27
Section 10 (f).....	28
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 et seq.).....	2, 29
Title I.....	29
Section 101.....	29
Section 2.....	29

Statutes—Continued

	Page
Section 2 (6)-----	10, 29
Section 2 (7)-----	10, 29
Section 8 (a)-----	29
Section 8 (a) (3)-----	4, 11, 29
Section 8 (b)-----	30
Section 8 (b) (2)-----	6, 11, 31
Section 8 (b) (3)-----	6, 11, 31
Section 8 (b) (4)-----	19
Section 8 (d)-----	11, 31
Section 8 (d) (1)-----	31
Section 8 (d) (2)-----	32
Section 8 (d) (3)-----	32
Section 8 (d) (4)-----	32
Section 9 (a)-----	32
Section 9 (e) (1)-----	4, 10, 32
Section 9 (e) (2)-----	33
Section 9 (e) (3)-----	33
Section 10 (a)-----	11, 18, 33
Section 10 (e)-----	12, 34
Section 10 (f)-----	12, 34
Section 10 (j)-----	7, 16, 35
Section 10 (l)-----	7, 16, 36
Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C., Secs. 101 et seq.)--	6, 17
Miscellaneous:	
Borchard, <i>Declaratory Judgments</i> (1941 ed.), pp. 247-248, 342---	22, 24
29 Cong. Rec. 7651-7652-----	13
H. R. No. 510, June 1947 (p. 52)-----	18
H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24-----	13
S. Rep. No. 573, 74th Cong., 1st Sess., p. 15-----	13

In the United States Court of Appeals for the Ninth Circuit

No. 12150

**CALIFORNIA ASSOCIATION OF EMPLOYERS, A CALIFORNIA
CORPORATION DOING BUSINESS UNDER THE FIRM
NAME AND STYLE OF RENO EMPLOYERS COUNCIL,
APPELLANT**

v.

**BUILDING AND CONSTRUCTION TRADES COUNCIL OF
RENO, NEVADA, AND VICINITY, ET AL., AND NATIONAL
LABOR RELATIONS BOARD, APPELLEES**

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEVADA*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on appeal from an order of the United States District Court for the District of Nevada (R. 267-268), dismissing an action brought by the California Association of Employers (appellant herein)¹ for a declaratory judgment and injunctive relief (R. 2-44).

¹ The Association is a California corporation, doing business in the State of Nevada under the fictitious name of Reno Employers Council (R. 3). It represents, for collective bargaining purposes, "the vast majority of firms supplying [building] materials and doing construction work in the Northwestern part of the State of Nevada and in the Northwestern part of the State of California" (R. 5-7). The California Association of Employers is hereinafter referred to as "the Association" or "the appellant."

The action below named as defendants the Building and Construction Trades Council of Reno, Nevada, and sixteen individual labor organizations affiliated with the Council (R. 2-3).² The jurisdiction of the District Court was predicated on Article I, Section 8, Clause 3 of the Constitution of the United States, the National Labor Relations Act as amended (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 *et seq.*), Section 24 (8) of the Judicial Code,³ and the Declaratory Judgment Act⁴ (R. 5, 63-64; Appellant's Br., pp. 2-3).

After commencement of the action below, the National Labor Relations Board (hereinafter called "the Board") petitioned the District Court for leave to intervene (R. 149-151). The Association and the Union consented to such intervention (R. 153-154), and, on September 16, 1948, the court granted the Board leave to intervene (R. 158).

Both the Union and the Board filed motions to dismiss the complaint (R. 145-149, 155-159). The District Court, after hearing (R. 160-267), granted the Board's motion "upon all the grounds urged" therein, and entered an order dismissing the complaint (R. 267-268). The decision of the court, ac-

² The Building and Construction Trades Council represents, for collective bargaining purposes, the labor organizations affiliated therewith. The members of these labor organizations are employed in the industry represented by the Association. (R. 3, 18-19; Appellant's Br., p. 3.) The Trades Council and its affiliated unions are hereinafter referred to as "the Union."

³ Now 28 U. S. C. § 1337.

⁴ 28 U. S. C., Sec. 400. Now 28 U. S. C. §§ 2201, 2202.

companying the order, appears in the record at R. 268-272.

This Court has jurisdiction of the appeal pursuant to 28 U. S. C. § 1291.

STATEMENT OF THE CASE

I. The complaint in the court below

The complaint (R. 2-44), filed on May 21, 1948, insofar as is here pertinent, alleged in substance as follows:

1. On May 24, 1947, the Association and the Union entered into a master industry collective bargaining contract, which provided that it shall remain in effect through "May 21, 1948, and shall continue to remain in full force and effect thereafter, except as to wages and hours, which may be subject to change or modification" on thirty days' written notice by either party (R. 4, 29). The contract contained a closed shop or "union referral slip" clause, under which no employee could be hired unless he exhibited a slip certifying in effect that the "employee is a member of the proper affiliated union and/or recommended by said union to the employer" (R. 10-11, 20-21).

2. About March 15, 1948, the Association notified the Union that it desired to negotiate concerning the contract, "in order to bring about certain changes which will make our agreement in accordance with the provisions of the" amended National Labor Relations Act⁵ (R. 7-8, 35). Negotiations were there-

⁵ 61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 *et seq.*; hereinafter called "the Act."

upon undertaken, wherein the Association advised the Union that in its view, the contract was subject to the provisions of the Act; that the Act prevented continuation of the contract beyond May 21, 1948 without revision of the present union security clause; and that the Union should immediately take steps to comply with the Act "by filing the necessary petitions so that proper elections may be held prior to May 21, 1948 for the purpose of securing proper authority to request union security provision" in the contract* (R. 8).

3. The Union replied that it did not believe that the Act applied to the construction industry, and that, until a court determined this question and the Board established feasible procedures for union shop elections, further negotiations would occur only on condition that the present closed-shop clause be continued (R. 9, 36-38). At this point, all negotiations between the Association and the Union terminated (R. 9-10).

4. During the course of the aforesaid negotiations, the Association requested the General Counsel of the Board for an opinion as to whether the Act applied to employment relations in the industry (R. 10, 39-41). He declined to render such opinion, because the problem posed was "a controversial one" which had not yet been "the subject of Board and Court decisions" (R. 10, 42).

5. The firms represented by the Association are engaged in, and use materials which flow in, interstate commerce (R. 7).

* See Sections 9 (e) (1) and 8 (a) (3) of the Act, which are set forth in the Appendix, *infra*, pp. 27-39.

6. The refusal of the Union to negotiate except on the assumption that the Act is inapplicable is not in good faith, but merely a subterfuge to coerce the Association into agreeing to increase existing wage rates (R. 11-12). Further, the continuation of the existing closed-shop clause, as demanded by the Union, would be in direct violation of the Act (R. 11).

7. In view of the impasse reached, the contract would expire on May 21, 1948, and the renewal or substitution thereof would be precluded (R. 12-13). The termination of the contract would be followed by an interruption in the free flow of interstate commerce, for the Union would immediately resort to strikes, slow-downs and other forms of economic coercion (R. 12-14).

Accordingly, the complaint requested, *inter alia*, that the court render a declaratory judgment as to whether the Act governs any collective bargaining contract between the Association and the Union; and that, pending this judgment, the court issue a temporary restraining order (and then, after due notice, a preliminary injunction) enjoining the Union "from using coercion of any kind to prevent the maintenance of the status quo" (R. 15-16).

II. The motions to dismiss

On the day the complaint was filed (May 21, 1948), the District Court issued an *ex parte* temporary restraining order (enjoining the Union as prayed in the complaint), and a rule requiring the Union to show cause why a preliminary injunction should not issue (R. 45-57). On May 28, 1948, the Union filed a motion to vacate the restraining order and the rule, for

the reason, *inter alia*, that the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. Secs. 101 *et seq.*) deprived the court of jurisdiction to grant injunctive relief (R. 47-49). After hearing, the court dissolved and vacated the temporary restraining order previously issued, and denied the Association's application for a preliminary injunction (R. 50). The court held (R. 140-144) that the Norris-LaGuardia Act precluded a preliminary injunction, and that the ban imposed by this Act was not lifted by the amended National Labor Relations Act.

Thereafter the Union filed motions to dismiss the complaint (R. 145-149), on the ground, *inter alia*, that the court lacked jurisdiction because the subject matter of the action was exclusively within the jurisdiction of the National Labor Relations Board, and was not within the provisions of the Declaratory Judgment Act. The Board, which had been granted leave to intervene (R. 149-151, 158, 153-154), also filed a motion to dismiss the complaint (R. 158-159).

The Board's motion pointed out (R. 158) that the gravamen of the complaint was that "the collective bargaining agreement between [the Association and the Union] is subject to the provisions of the National Labor Relations Act, as amended * * * and that [the Union is] engaging in, or threaten[s] to engage in, certain conduct which constitutes unfair labor practices under Section 8 (b) (2) and (3) of that Act."⁷ The Board urged that the court was without

⁷ These provisions are set forth in the Appendix, *infra*, pp. 27-39. The allegations of the complaint which suggest violations of these provisions are summarized in "6" and "7," *supra*, p. 5.

jurisdiction of the subject matter of the complaint because (R. 159):

1. The Act vests the Board "with exclusive initial jurisdiction of matters involving unfair labor practices."

2. "The federal district courts do not have jurisdiction, at the suit of private parties, to determine whether the operations of employers and labor organizations affect commerce within the meaning of the [Act], to determine whether unfair labor practices within the meaning of the Act have been committed, or to remedy, by injunction or otherwise, unfair labor practices. The jurisdiction of the federal district courts over unfair labor practices has been expressly limited by Sections 10 (j) and 10 (l) of the [Act] to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed."

3. The Association "has failed to exhaust its administrative remedy under the provisions of the [Act]."

The Union filed a further motion to dismiss the complaint (R. 155-157), for the reason that the action had become moot and therefore there was no actual controversy between the parties upon which the court could render a declaratory judgment. The affidavit annexed to this motion (R. 156-157) stated that the May 1947 contract (R. 17-30) has since expired and was no longer of "force and effect;" that new and different contracts had been entered into by each of

the labor organizations affiliated with the Building and Trades Council; that the employees and employers were then operating under these "new, separate and distinct contracts;" and that there was then no "labor dispute or trouble * * * in the City of Reno between parties plaintiff and any of the parties defendant and covered by any of the provisions" of the May 1947 contract.

III. The proceedings in the District Court on the Board's motion to dismiss the complaint

A hearing on the Board's motion to dismiss the complaint was held on September 16, 1948 (R. 160-267). At the start of the hearing, the Association conceded that all allegations in the complaint regarding unfair labor practices on the part of the Union and irreparable injury (see "6" and "7," *supra*, p. 5) were no longer in the case, and agreed to withdraw those portions of the prayer which requested injunctive relief (R. 162-164, 169-175). In short, the Association stated that it was not asking the court to determine whether certain past or threatened conduct by the Union constituted unfair labor practices under the Act, or to remedy such practices; it was merely asking the court to render a declaratory judgment as to whether any collective bargaining contract between the Association and the Union was governed by the Act (R. 173-175).⁸

⁸ The Association denied, however, that the controversy had ceased, as alleged by the Union in its affidavit (*supra*, p. 7). The Association contended that certain of the labor organizations had not entered into new contracts, and that, as to those that had, the matter of union security had been left open pending the court's

At the close of the hearing, the court granted the Board's motion to dismiss the complaint, "upon all the grounds urged in the motion" (R. 266). The order of the court dismissing the complaint was entered on October 18, 1948 (R. 267-268). In its accompanying decision (R. 268-272), the court stated (R. 270):

The whole question resolves itself around the point as to whether or not the unions here are engaged in interstate commerce. This Court might hold they were * * * and they might get a decision in the district court in Sacramento or San Francisco contrary * * *. There would be appeals to Circuit Court of Appeals in both cases. That might go on all over the Circuit and continue throughout the United States * * *

This, the court added (R. 270-271), would be contrary to the intention of Congress to "establish a single paramount administrative or quasi-judicial authority" for the purpose of determining "questions of unfair labor practices and also the question of jurisdiction under the Act" (citing *Amazon Cotton Mill Co. v. Textile Workers*, 167 F. 2d 183, 186 (C. A. 4)). "I think it is conceded that the National Labor Relations Board has the jurisdiction to determine whether or not these unions are subject" to the Act (R. 271). If the court were to decide this matter: "This would be a case where the court steps in before an administrative body, created primarily and specifically for the decision (R. 165-169). Although the Association stated that it had filed an affidavit summarizing these facts (R. 168), a copy of such affidavit is not contained in the record.

purpose of deciding such questions, has an opportunity to act'' (*ibid.*).

ARGUMENT

Preliminary statement

From the face of the complaint (R. 5, 8, 11-13, 16) it is apparent that the relief sought by the Association in the court below was a determination whether the action of the Union in refusing to negotiate, except upon condition that a union security clause not executed in conformity with Section 9 (e) (1) of the National Labor Relations Act, as amended, be included in any agreement reached, was an unfair labor practice.⁹ The complaint further discloses that resolution of this question depends upon whether the National Labor Relations Act is deemed to govern employment relations in the particular segment of the construction industry in which the Association and the Union are engaged. Thus, the Association's contention, that any union security agreement executed by the parties must conform to Section 9 (e) (1), rests upon its view that the operations of its members affect commerce within the meaning of that Act.¹⁰ The Union's position, that Section 9 (e) (1) need not be

⁹ Although at the hearing the Association withdrew its request for a declaration that the union's conduct was an unfair labor practice, together with its request for injunctive relief, this withdrawal does not obscure the fact that the sole purpose of the complaint was to obtain relief against conduct which the Association believed to constitute unfair labor practices.

¹⁰ See Sections 2 (6) and (7) set forth in the Appendix, *infra*, pp. 27-39. Cf. *United Brotherhood of Carpenters & Joiners v. Sperry*, 170 F. 2d 863 (C. A. 10); *Shore v. Bldg. Trades Council*, 23 L. R. R. M. 2417 (C. A. 3, March 4, 1949).

complied with, rests upon its contention that the Act as a whole is inapplicable to the activities of the Association and its constituent members.

Congress, in Section 10 of the Act, established procedures for the resolution of questions such as these concerning the effect and applicability of the National Labor Relations Act. Pursuant to those procedures the Association could have filed charges with the National Labor Relations Board alleging that the Union's insistence upon incorporation of an illegal clause in the agreement between the parties constituted a refusal to bargain within the meaning of Section 8 (d) of the amended Act, and was therefore an unfair labor practice within the meaning of Section 8 (b) (3) thereof. The Association might also have alleged that the action of the Union in seeking to induce the Association to retain such a union security clause in the agreement constituted an attempt to cause the Association and its members "to discriminate against an employee in violation of Section 8 (a) 3," and was an unfair labor practice under Section 8 (b) (2) of the Act. Charges such as these, setting in motion the remedial procedures specified in Section 10 of the Act, would culminate, as in other cases, in decision by the National Labor Relations Board of the questions presented.¹¹ Disposition of such charges by the Board, in the circumstances shown by the complaint

¹¹ See, e. g., *Matter of Nat'l Maritime Union*, 78 N. L. R. B. 971; *Ibid.*, 82 N. L. R. B. No. 152, decided April 19, 1949; *Matter of American Radio Ass'n*, 82 N. L. R. B. No. 151, decided April 19, 1949; *Matter of Amalgamated Meat Cutters*, 81 N. L. R. B. No. 164, decided March 1, 1949.

filed herein, would require that the Board decide whether the Act is applicable to the operations of the Association and the Union, as a condition to determining whether unfair labor practices were committed by the Union. Upon the issuance of a decision and order by the Board, the matter could be presented to the appropriate Court of Appeals for review, either on the Board's petition for enforcement (Section 10 (e)) or on the Union's or the Association's petition for review (Section 10 (f)). Cf. *N. L. R. B. v. Nat'l. Maritime Union*, now pending before the Court of Appeals for the Second Circuit on the Board's petition for enforcement of its order issued in *Matter of Nat'l. Maritime Union*, 78 N. L. R. B. 971.

Instead of resorting to this statutory procedure to secure the relief it desired, the Association attempted to circumvent it by first seeking an advisory opinion from the General Counsel, and then, on the latter's refusal to give one, seeking relief in the District Court of the United States, not upon the basis of any jurisdiction conferred by the National Labor Relations Act, which is the governing statute, but upon the Declaratory Judgment Act, which contemplates a pre-existing basis of jurisdiction, here lacking.

We show hereafter that the District Court properly dismissed the complaint because jurisdiction of the subject matter was lacking, and, independently thereof, the complaint was demurrable because of the absence of indispensable bases for equitable or declaratory relief.

POINT I

The District Court was without jurisdiction of the subject matter of the action

A. The National Labor Relations Act vests the Board with exclusive primary jurisdiction to determine whether unfair labor practices have been committed and to decide subsidiary questions such as whether the Act is applicable to particular persons or controversies

It is perfectly clear from the legislative history of the original National Labor Relations Act (49 Stat. 449, 29 U. S. C., Secs. 151 *et seq.*) that Congress intended "to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 15), and that, instead of conferring private rights enforceable in the courts at the suit of private parties, it intended to create only "public" rights enforceable by the Board. H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24. The Act implemented this congressional intent in the following manner: Section 10 (a) expressly provided that the Board's power "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce * * * *shall be exclusive*, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."¹² [*Italics added.*] Judicial re-

¹² The bill as originally drafted contained a provision granting concurrent jurisdiction to the Board and the federal district courts to prevent unfair labor practices, but this provision was deleted by Committee amendment on the floor of the Senate. 29 Cong. Rec. 7651-7652.

view was provided for, but it was expressly limited to review of final orders of the Board, and jurisdiction to review such orders was vested exclusively in the United States Courts of Appeals (Sections 10 (e) and (f)).

In consequence of this background, the courts recognized that the Board was vested with exclusive primary jurisdiction to determine whether unfair labor practices had been committed, and to provide redress against such practices. The courts implemented this recognition by holding that both the federal district courts and state courts were precluded from affording private parties relief against alleged unfair labor practices. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265-270; *Nat'l Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 362, 366; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Blankenship v. Kurfman*, 96 F. 2d 450 (C. A. 7); *Fur Workers v. Fur Workers*, 105 F. 2d 1, 12-16 (C. A. D. C.), affirmed, 308 U. S. 522; *Int'l Brotherhood v. Int'l Union*, 106 F. 2d 871 (C. A. 9); *U. E. R. & M. Workers v. I. B. E. W.*, 115 F. 2d 488 (C. A. 2); *United Brick & Clay Workers v. Junction City Clay Co.*, 158 F. 2d 552 (C. A. 6). See also, *Bethlehem Steel Corp. v. N. Y. S. L. R. B.*, 330 U. S. 767; *La Crosse Telephone Corp. v. Wisconsin E. R. B.*, 336 U. S. 18. Moreover, because the statutory procedure was deemed exclusive, it was held that private parties could seek redress against allegedly unlawful action by the Board only after the Board had issued a final order in an unfair labor practice proceeding, and then only in the Courts of Appeals. *N. L. R. B.*

v. Jones & Laughlin Steel Corp., 301 U. S. 1, 46-47; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U. S. 54; *A. F. of L. v. N. L. R. B.*, 308 U. S. 401; *Madden v. Brotherhood*, 147 F. 2d 439 (C. A. 4).

Early in the history of the National Labor Relations Act the Supreme Court held that the exclusive primary jurisdiction of the Board extended not only to determining whether unfair labor practices had been committed, but also to determining whether particular persons or enterprises were subject to the Act. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Newport News Shipbuilding & Drydock Co. v. Schauffler*, 303 U. S. 54; *Int'l. Brotherhood v. Int'l. Union*, 106 F. 2d 871 (C. A. 9). Cf. *Greenebaum Tanning Co. v. N. L. R. B.*, 129 F. 2d 487, 488-489 (C. A. 7). Power to determine this question, of course, is a necessary incident of the power to determine whether unfair labor practices have been committed. To deprive the Board of power to pass upon questions of jurisdiction would nullify the "specific and all-embracing powers" conferred upon the Board by Section 10 (a), and would run counter to "the general rule that a tribunal empowered to hear controversies is empowered to pass upon its jurisdiction to hear those controversies." *Thompson Products, Inc. v. N. L. R. B.*, 133 F. 2d 637, 640 (C. A. 6). Since Congress had conferred power upon the Board to determine questions of jurisdiction initially, and since that power was exclusive, the Supreme Court, in the cases cited above,

specifically held that the district courts were without jurisdiction to determine whether particular persons or controversies were subject to the Act.

Title I of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 *et seq.*), which amended the National Labor Relations Act, did not broaden the power of the district courts in this respect. In that Act, it is true, Congress conferred upon the federal district courts jurisdiction to afford temporary relief against certain types of unfair labor practices. But it is clear that the jurisdiction thus conferred permits the granting of relief only upon a petition filed by the Board, not upon a suit brought by private parties. And it is also clear that such relief is to serve as an incident to proceedings before the Board, to be effective only until entry of a decision by the Board—it is not, as appellant would have it, available as a substitute for Board proceedings.¹³

¹³ The only provisions of the amended National Labor Relations Act (Title I of the Labor Management Relations Act) which deal with the jurisdiction of the federal district courts are Sections 10 (j) and (1). Section 10 (j) gives the federal district courts jurisdiction to grant temporary injunctions *upon application of the Board*, after the latter has issued a complaint charging an unfair labor practice. Section 10 (1), which is limited to certain strikes and secondary boycotts (declared by Section 8 (b) to be unfair labor practices on the part of labor organizations), empowers the federal district courts to grant temporary injunctive relief *upon application of an officer or regional attorney of the Board*, pending the Board's final determination as to whether an unfair labor practice has been committed.

The remaining provisions of the Labor Management Relations Act which deal with the jurisdiction of the federal district courts are in Titles II and III of that Act, involving matters separate and apart from those covered by the National Labor Relations Act Title I). These provisions are: (1) Section 208 (a), under which

The Court of Appeals for the Fourth Circuit, after an exhaustive analysis of the text and legislative history of the Labor Management Relations Act, rejected the argument that the Act expanded the power of the federal district courts to deal with matters committed to the primary jurisdiction of the Board. *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183.¹⁴ The Court said (p. 186):

There is nothing in either the text or the history of the Labor Management Relations Act to indicate * * * any intention to change the method by which unfair labor practices were

the federal district courts are authorized to issue injunctions, notwithstanding the provisions of the Norris-LaGuardia Act, in certain cases involving strikes and lockouts affecting interstate commerce and imperiling the national health and safety, but only upon petition of the Attorney General following a report of a board of inquiry and direction by the President; (2) Section 301 (a) which vests such courts with jurisdiction to adjudicate suits for damages by private parties arising from breach of contract, and Section 303 (b) which confers similar authority in cases involving certain strikes and secondary boycotts engaged in by labor organizations; and (3) Section 302 (e), under which federal district courts are authorized to enjoin payments by employers to employee representatives, made in violation of Section 302.

¹⁴ The *Amazon* case arose out of a suit in a federal district court brought by a union against an employer. The union alleged that the employer had committed an unfair labor practice by refusing to bargain with the union, that, as a result, the employees had gone on strike, and that they had sustained damage in the form of loss of wages. The relief asked was an injunction requiring the employer to bargain with the union and an award of damages. Both the employer and the Board (which had been permitted to intervene) moved to dismiss on the ground that the Board had exclusive jurisdiction of the subject matter of the action and the District Court was accordingly without jurisdiction. The Court of Appeals sustained these contentions.

dealt with under the [original National Labor Relations] act or to vest the District Courts with jurisdiction as to these matters, except to the limited extent that such jurisdiction was expressly conferred [i. e., upon application of *the Board* for preliminary injunction, as provided in Sections 10 (j) and (1)].

In reaching this conclusion, the Court specifically considered and rejected the contention here urged by appellant (Br. p. 6), that, in eliminating the word "exclusive" from Section 10 (a) of the National Labor Relations Act (cf. p. 13, *supra*), Congress manifested an intention to confer a concurrent jurisdiction on the federal district courts. The Court stated (p. 187):

The change in the statute upon which reliance is placed was clearly intended, not to vest the courts with general jurisdiction over unfair labor practices, but to recognize the jurisdiction vested in the courts by section 10, subsections (j) and (1), section 208, and section 303 * * *, as well as the power in the Board, conferred by the proviso in section 10 (a) to cede jurisdiction to state agencies in certain cases. This is not only the clear meaning of the statute when its language is considered in the light of existing law, but it is also the meaning given it by the Conference Committee of the House and Senate (See H. R. No. 510, June 3, 1947 [p. 52]).¹⁵

¹⁵ The Court also made it clear that Section 303 (b) of the Labor Management Relations Act (see *supra*, p. 17, n. 13) did not confer jurisdiction upon the federal district courts of unfair labor practices under the National Labor Relations Act. Although the strikes and boycotts, for which Section 303 (b) provides a private

The broad holding of the *Amazon* case—that the Labor Management Relations Act made no such changes in the original National Labor Relations Act as would vest the federal district courts with jurisdiction to determine questions committed to the primary jurisdiction of the Board—was also articulated by the Supreme Court in *Bakery Sales Drivers v. Wagshal*, 333 U. S. 437, 442, decided two weeks before *Amazon*. And such holding has been uniformly followed by the other courts which have considered the question. *Amalgamated Association v. Dixie Motor Coach Corp.*, 170 F. 2d 902 (C. A. 8); *Packinghouse Workers v. Wilson & Co.*, 80 F. Supp. 563 (N. D. Ill.). Indeed this very doctrine was successfully urged by appellant in a suit in which it was a defendant. *I. L. U. v. Sunset Line & Twine Co.*, 77 F. Supp. 119 (N. D. Cal.).¹⁶ See also, *Fitzgerald v. Douds*, 167 F. 2d 714 (C. A. 2); *Int'l Union v. Int'l Union*, — F. 2d — 23

remedy in the courts, are made unfair labor practices by Section 8 (b) (4) of the amended National Labor Relations Act, the basis of the 303 (b) remedy is not that such activities are unfair labor practices under the National Labor Relations Act but rather that, by virtue of Section 303 (a) of the Labor Management Relations Act, they are independently unlawful for purposes of that section of the Labor Management Relations Act only. Moreover, the 303 (b) remedy is limited to damages; the courts are without jurisdiction to grant injunctive relief. 167 F. 2d at 188–189. See also, the *Dixie*, *Wagshal* and *Sunset* cases cited in the text.

¹⁶ The *Sunset* case involved an action similar to that in *Amazon*. Appellant was one of the defendants. The defendants therein, as well as the Board (which had intervened), moved to dismiss on the ground that the subject matter of the action was within the exclusive jurisdiction of the Board. It would thus seem that appellant is in the anomalous position of recognizing the Board's exclusive primary jurisdiction and the District Court's lack of jurisdiction when it is advantageous to do so (*Sunset*), and of failing to recognize it when it is not advantageous (the instant case).

L. R. R. M. 2517 (C. A. 8 March 31, 1949). Cf. *Gerry v. Superior Court*, 194 P. 2d 689, 22 L. R. R. M. 2279 (Cal. S. Ct. June 16, 1948); *In re DeSilva*, 23 L. R. R. M. 2085 (Cal. S. Ct., November 16, 1948); *Alonzo v. Industrial Container Corp.*, 23 L. R. R. M. 2169 (N. Y. S. Ct., December 22, 1948); *Ind'l Comm'n. of Utah v. N. L. R. B.*, 172 F. 2d 389 (C. A. 10).

It is clear, of course, that if the amended Act did not empower the federal district courts to determine, at the suit of private parties, whether particular conduct constitutes an unfair labor practice, it did not empower them to decide the subsidiary question whether particular persons or controversies are subject to the Act. Under the initial Act, as we have shown, *supra*, pp. 15-16, the district courts were without power to consider or decide either of these questions in any circumstances. The sole change made by the amended Act empowers the district courts to decide these questions preliminarily, but only when requested to do so by the Board, as an aid to proceedings pending before the Board.¹⁷ The failure of Congress to expand the jurisdiction of the district courts beyond this is further evidence of the purpose of Congress to reaffirm the exclusive nature of the power conferred upon the Board to determine controversies concerning the coverage and meaning of the Act.

¹⁷ *Supra*, p. 16. See *Madden v. United Mine Workers*, 79 F. Supp. 616 (D. C. D. C.); *Evans v. I. T. U.*, 76 F. Supp. 881 (D. Ind.).

B. The Federal Declaratory Judgment Act does not confer upon District Courts concurrent jurisdiction with the Board to determine whether the National Labor Relations Act is applicable to particular persons or controversies

That the Declaratory Judgment Act does not enlarge the jurisdiction of federal district courts so as to confer upon them power to determine the applicability of the National Labor Relations Act, is demonstrated by the *Schauffler* case (*supra*, p. 15). There, as here, an employer requested a District Court to render a declaratory judgment as to whether its employment relations were governed by the Act. It was alleged that the Board intended to hold a hearing on an unfair labor practice complaint which had been issued against the employer, that such hearing was beyond the Board's authority because the employer's operations did not "affect commerce," and that, if the hearing were held, the employer would be irreparably damaged and its constitutional rights infringed. The Supreme Court held that, for the same reason that the District Court was without jurisdiction to determine the question presented in an equity suit (*Myers* case, *supra*), it was likewise without jurisdiction to determine it in a declaratory judgment action.

This Court, in *Int'l. Brotherhood v. Int'l. Union*, 106 F. 2d 871, reached the same conclusion. There the Brewery Workers Union had brought suit in the District Court against the Teamsters Union, requesting, *inter alia*, that the court, by declaratory judgment, determine the Brewery Workers to be the exclusive bargaining agent of certain employees. This Court held that the District Court was without juris-

diction to grant the relief requested, because the subject matter of the action was within the exclusive primary jurisdiction of the Board.

The rationale for the *Schauffler* and *Int'l Brotherhood* holdings is the well-established principle that the Declaratory Judgment Act does not extend the jurisdiction of the federal district courts "over an area not already covered or expressly forbidden." *Di Benedetto v. Morgenthau*, 148 F. 2d 223, 225 (C. A. D. C.), certiorari dismissed, 326 U. S. 686. See also, Borchard, *Declaratory Judgments* (1941 ed.), pp. 247-248; *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540, 545, n. 4; *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240; *Bradley Lumber Co. v. N. L. R. B.*, 84 F. 2d 97, 100 (C. A. 5), certiorari denied, 299 U. S. 559; *Doehler Metal Furniture Co. v. Warren*, 129 F. 2d 43, 45 (C. A. D. C.), certiorari denied, 317 U. S. 663; *Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n.*, 101 F. 2d 426, 429-431 (C. A. D. C.), affirmed on other grounds, 306 U. S. 56; *Putnam v. Ickes*, 78 F. 2d 223, 226 (C. A. D. C.), certiorari denied, 296 U. S. 612; *Carbides Carbon Corp. v. Industrial Chemicals Co.*, 140 F. 2d 47, 50 (C. A. 4); *Miles Laboratories v. F. T. C.*, 140 F. 2d 683, 685 (C. A. D. C.), certiorari denied 322 U. S. 752. In other words, the federal district courts could grant a declaratory judgment as to the scope or coverage of the National Labor Relations Act only if, independent of the Declaratory Judgment Act, they had concurrent jurisdiction with the Board to determine such questions. As we have shown, however, the Board's primary jurisdic-

tion to decide these matters is exclusive and is subject to review only by the Court of Appeals. This, therefore, is an area in which the Declaratory Judgment Act is inoperative.

If appellant's contention that the Declaratory Judgment Act confers jurisdiction upon the district courts independently of the provisions of the National Labor Relations Act were sound, it would mean that the district courts are empowered, concurrently with the Board, to determine whether particular conduct amounts to an unfair labor practice, as well as to determine whether particular enterprises are subject to the provisions of the statute. This contention, long foreclosed under the National Labor Relations Act (see pp. 14-15, *supra*), has now been laid to rest by the unanimous decisions of the courts construing the Act, as amended. See, cases cited, pp. 17-20, *supra*.

POINT II

The complaint was properly dismissed because appellant failed to exhaust the complete and adequate administrative remedy given by the governing statute

As we have shown (*supra*, pp. 11-12), appellant could have obtained the relief it sought by filing unfair labor practice charges against the Union with the Board.

Instead of following the statutory procedure, which would have afforded it a complete and adequate remedy, appellant applied directly to a federal district court for relief. But, as the District Court held, it was barred from granting the relief requested by "the

long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540; *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752.¹⁸

The rule requiring exhaustion of administrative remedies is as applicable to suits for declaratory judgment, as to actions for other types of relief. It is well recognized that where a statute provides, as does the Act in Sections 10 (e) and (f), a special and exclusive administrative procedure whereby redress may be secured, relief by way of declaratory judgment is barred unless and until the administrative procedure has been complied with. Borchard, *Declaratory Judgments*, (1941 ed.), p. 342; *Miles Laboratories, Inc. v. F. T. C.*, 140 F. 2d 683, 685 (C. A. D. C.), certiorari denied, 322 U. S. 752; *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 240, 251 (C. A. D. C.), affirmed, 319 U. S. 732; *Elliott v. American Mfg. Co.*, 138 F. 2d 678, 679 (C. A. 5); *Jones & Laughlin Steel Corp. v. United Mine Workers*, 159 F. 2d 18 (C. A. D. C.), certiorari denied, 331 U. S. 828.

¹⁸ See also, *Fitzgerald v. Douds*, 167 F. 2d 714, 717 (C. A. 2); *Florida v. Bellman*, 149 F. 2d 890, 891 (C. A. 5); *United Brick & Clay Workers v. Junction City Clay Co.*, 158 F. 2d 552, 554 (C. A. 6); *Thompson Products v. N. L. R. B.*, 133 F. 2d 637, 640 (C. A. 6).

POINT III

The complaint was properly dismissed because the controversy was not subject to final and definitive adjudication by the district court

Apart from the exhaustion of administrative remedies rule, however, the Declaratory Judgment Act could not, in any event, be deemed to vest jurisdiction in the federal district courts to entertain the action. Clearly, that Act does not vest in the district courts jurisdiction to decide a controversy, unless it is one "admitting of an immediate and definitive determination of the legal rights of the parties." *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 241. See also, *Borchard, op. cit.*, pp. 83-86; *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 262. Here, a ruling by the District Court on the question presented would be purely "advisory" and in no way "definitive" of the legal rights of the parties. For, no matter how the court ruled on the question whether the operations of appellant's members affected commerce within the meaning of the Act, both appellant and the Union would be free to seek redetermination of the matter by the Board. The Union, notwithstanding the court's decision, would remain free to petition the Board (pursuant to Section 9 (e)) for a union shop election. The Board, in the course of processing such petition, would be free to decide the matter of jurisdiction *res integra*. Similarly, if, in the course of future negotiations, one party engages in conduct violative of the Act, the other remains free to file unfair labor practice charges with the Board, and the Board, unaffected by

the court's decision, would be free to entertain such charges and to impose sanctions against the offender. Cf. *Matter of Denver Bldg. & Construction Trades Council*, 82 N. L. R. B. No. 5, 23 L. R. B. M. 1524, March 15, 1949; *Ibid.*, 82 N. L. R. B. No. 137, 23 L. R. B. M. 1656, April 13, 1949. In short, irrespective of what decision the District Court renders, it would not conclusively determine the question of whether the labor relations of appellant and the Union are governed by the Act—only the Board, subject to review by the appropriate Court of Appeals, has power definitely to resolve this issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below be affirmed.

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MAY 1949.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings

set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

The relevant provisions of the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

* * * * *

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

“DEFINITIONS

“SEC. 2. When used in this Act—

* * * * *

“(6) The term ‘commerce’ means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

“(7) The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

“UNFAIR LABOR PRACTICES

“SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

“(3) by discrimination in regard to hire or tenure of employment or any term or con-

dition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

“(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

“(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

“(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to provisions of section 9 (a);

* * * * *

“(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

“(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

“(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

“(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

“(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *

* * * * *

“REPRESENTATIVES AND ELECTIONS

“SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

“(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an

appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

“(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

“(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

* * * * *

“PREVENTION OF UNFAIR LABOR PRACTICES

“SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determining of such cases by such

agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * *

“(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States

Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

“(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * * *

“(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe

* * * * *

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECT- ING COMMERCE; NATIONAL EMER- GENCIES

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

* * * * *

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * *

RESTRICTIONS ON PAYMENTS TO EMPLOYEE
REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

* * * * *

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section,

without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

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BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in any industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been

certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.



No. 12150

IN THE

United States Court of Appeals

For the Ninth Circuit

CALIFORNIA ASSOCIATION OF EMPLOYERS, a
California Corporation doing business
under the firm and style of RENO EM-
PLOYERS COUNCIL,

Appellant.

VS.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF RENO, NEVADA, AND VICIN-
ITY, *et al.*, and NATIONAL LABOR RELA-
TIONS BOARD,

Appellees.

**On Appeal from the United States District Court for
the District of Nevada**

**REPLY BRIEF TO THE BRIEF OF THE
NATIONAL LABOR RELATIONS BOARD
and BRIEF OF OTHER APPELLEES**

FILED

MAY 31 1949

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INDEX

Page

REPLY to POINT I of National Labor Relations
Board Brief (pages 13 to 23).

- A. That the National Labor Relations Act vests Board with exclusive primary jurisdiction to determine whether unfair labor practices have been committed and to decide subsidiary questions such as whether the act is applicable to particular persons or controversies 3-9
- B. That Federal Declaratory Judgment Act does not confer upon District Courts concurrent jurisdiction with the Board to determine whether the National Labor Relations Act is applicable to particular persons or controversies 3-9

REPLY to POINT II (Board's Brief, pp. 23-24).....9-18

REPLY to POINT III (Board's Brief, pp. 25-26).....18

REPLY to BRIEF of Building and Construction
Trades Council etc., et al.

- A. Reply to point made, pp. 31-48, that appeal should be dismissed because the grounds upon which it is founded are now moot.....18

Authorities Cited

	Page
Aircraft & Diesel Equipment Corp., v. Hirsch, 331 U. S. 752.....	15
Algoma Plywood and Veneer Co. v. Wisconsin Em- ployment Relations Board, U. S.—93 L. Ed. 10541	4, 8, 14, 17
Amazon Cotton Mill Co. v. Textile Workers Union, 167, Fed. 2d. 183.....	4
Bethlehem Steel Corp. v. New York State Labor Relations Bd. 330 U.S. 767 91 L. Ed. 1234, 67 S. Ct. 1026.....	7, 13
Gerry v. Superior Court, 32 Cal. (2d) 119, 194 P(2d) 689....	9
McCauley v. Waterman Steamship Corp., 327 U.S. 540.....	13
Maryland Casualty Co. v. Pac. Coal & Oil Co., 312 U.S. 270 85 L. Ed. 826.....	15
Meyers v. Bethlehem Shipbuilding Corp. 303 U.S. 41, 82 L. Ed. 639.....	12
Mississippi Power & Light Co. v. City of Jackson, (5 cir.) 116 F (2d) 924, cert. den. 312 U.S. 698, 61 S. Ct. 741, 85 L. Ed. 1133.....	10
Oil Workers International Union, Local No. 463, et al. v. Texoma Natural Gas Co., 146 (2d) 62.....	9
Tennessee Coal I & R Co. v. Muscoda Local No. 123, 321 U.S. 590, 88 L. Ed. 610, 64 S. Ct. 698.....	12
United States v. United Mine Workers, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677.....	3
173 A.L.R. 1427.....	17

Statutes

	Page
Federal Rules of Civil Procedure: Rule 57.....	9, 11
Labor Management Relations Act, 1947.....	3, 6
Section 10 (a).....	6, 13, 14, 18
Section 2 (6).....	8
Section 7.....	8
Section 8.....	18
28 U.S.C.A., Sec. 400.....	7, 9
28 U.S.C.A. Sec. 2201.....	7, 11
28 U.S.C.A. Sec. 2202.....	7
29 U.S.C.A. Sec. 151.....	12
29 U.S.C.A. Sec. 201.....	12
50 U.S.C.A. Appl. 1507.....	11

Texts

Borchard, Declaratory Judgments, 2nd Ed., 546.....	11
--	----

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**REPLY BRIEF TO THE BRIEF OF THE
NATIONAL LABOR RELATIONS BOARD
and BRIEF OF OTHER APPELLEES**

I.

REPLY TO BOARD'S REPLY

As stated in the Board's Brief, page 8, the point here involved is correctly stated, "In short, the Association stated that it was not asking the court to determine whether certain past or threatened conduct by the Union constituted unfair labor practices under the Act, or to remedy such

practices; it was merely asking the court to render a declaratory judgment as to whether any collective bargaining contract between the Association and the Union was governed by the Act. (R. 173-175)."

Appellants contend that there was a justiciable controversy in the instant case, to-wit: a disagreement as to whether the industry involved was engaged in interstate commerce or affected the same in such a manner as to place the negotiations between the parties whose interests were adverse (R. p. 7). Under Federal Act there was a tangible legal interest in the controversy by the party asserting it—for if the appellant entered into a contract providing for a closed shop or other union security provision and it were later determined that the industry represented came under the provisions of the Labor Management Act of 1947, each of the firms represented by Appellant might, under the terms of that Act, be subjected to penalties under the provisions thereof. The issue presented was and is ripe for adjudication. The parties were stalemated and the existing contract would, by its terms, expire at midnight, May 21, 1948.

The complaint filed by the Association in the District Court alleged a cause of action for declaratory judgment. If the complaint had ended by so doing—this question would have been apparent, the real issue is, if the complaint states a cause of action for declaratory relief, which Appellants state that it does, has the District Court jurisdiction to grant such relief?

The complaint as originally filed, by necessity, contained

many allegations in addition to stating a cause of action for declaratory relief, in order to disclose grounds sufficient for the Court to issue the temporary restraining order. The Court issued such order under the authority contained in *United States v. United Mine Workers*, 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677. No point is made on this appeal of the District Court's right to issue such order.

The Board's Brief, page 10, assumed that because the complaint stated the reasons for the reaching of an impasse in negotiations, being that the Association took the position that any contract to be entered into would be compelled to comply with the provision of the Labor Management Act of 1947, and the Union in taking the position that any such contract would not be so governed, and the position of the Union being that a closed shop provision was required if they were to enter into such contract, the action was one to remedy an unfair labor practice before the Court rather than the National Labor Relations Board. While the complaint might incidentally state such an unfair labor practice, it does not deprive the District Court of jurisdiction to render declaratory relief by deciding coverage under the facts stated therein.

The Board's argument further assumes:

1. That because a declaratory judgment of District Court might possibly prevent an unfair labor practice in the future, therefore Section 10(a) of the Labor Management Relations Act of 1947 gives the Board the exclusive right to decide the "subsidiary question," is the Act applicable to these particular persons and controversies; and

2. That because the Unions and the Association in good faith held differences of opinion in whether their contracts were under the provision of that Act or not, constituted an unfair labor practice, as it was a failure to bargain in good faith, and therefore should be a matter exclusively within the jurisdiction of the Board.

It is conceded that the case of *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 Fed. 2d 183, held under the facts of that case that the Board had exclusive right to invoke remedy of injunction to prevent an unfair labor practice, and that the Court did not. The facts of that case were different than the ones in the case at bar where we are merely seeking a declaratory judgment to the effect that Association is or is not within the commerce sections of the Labor Management Relations Act of 1947. Since the Amazon decision, the United States Supreme Court in *Algoma Plywood and Veneer Company v. Wisconsin Employment Relations Board*, decided 7 March, 1949, U. S., 93 L. Ed. Advance Sheet 10541, had occasion to reject in principle the contention of the Board that it alone has exclusive jurisdiction to prevent unfair labor practices and that declaratory relief available to Association in this case has been withdrawn from the District Court. Appellants contend that the argument contained in Point I of the Board's Brief, pages 13 to 23, as to intent of Congress is totally rejected by the Supreme Court.

The facts in the above case were briefly these:

Under pressure from the Department of Labor and the War Labor Board, an employer agreed to a maintenance-of-

membership clause in its collective bargaining agreement with a union, which previously, after an election held by the National Labor Relations Board, was certified by the Board as bargaining representative for all production employees. The clause was carried over from year to year, even after the dissolution of the War Labor Board. Pursuant to that clause the employer discharged an employee who refused to pay union dues.

Under a State statute making it an unfair labor practice for an employer to enter into an all-union agreement with the representatives of his employees unless such agreement has been approved by a specified majority of the employees, the State Employment Relations Board ordered the employer to cease and desist from giving effect to the maintenance-of-membership clause, to offer the employee reinstatement, and to make him whole for any loss of pay. This order was sustained by the highest court of the State, *as against the objections of the employer and the union that the jurisdiction of the State Board was ousted by the exclusive authority of the National Labor Relations Board, and that the State statute was repugnant to the National Labor Relations Act.*

A majority of the Supreme Court of the United States, in an opinion by Frankfurter, J., held that the effect given the State statute by the judgment of the State Supreme Court did not conflict with the enacted policies of Congress. The opinion reviews the legislative history of the Taft-Hartley Act, and on page 545, L. Ed. has this to say:

“In seeking to show that the Wisconsin board has no power to make the contested orders petitioner points

first to Sec. 10(a) of the National Labor Relations Act, which is set forth in the margin. It argues that the grant to the National Labor Relations Board of "exclusive" power to prevent "any unfair labor practice" thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument demands to equally untenable assumptions. One requires disregard of the parenthetical phrase "(listed in Section 8)"; the other depends upon attaching to the section as it stands the clause "and no other agency shall have power to prevent unfair labor practices not listed in Section 8." . . .

" . . . Here Wisconsin has attached conditions to their enforcement and has called the voluntary observance of such a contract when those conditions have not been met an "unfair labor practice." Had the sponsors of the National Labor Relations Act meant to deny effect to State policies inconsistent with the unrestricted enforcement of union-shop contracts, surely they would have made their purpose manifest. So far as appears from the Committee Reports, however, Sec. 10(a) was designed, as its language declares, merely to preclude conflict in the administration of remedies for the practices proscribed by Sec. 8. The House Report, after summarizing the provisions of the section, adds, "The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill." H. R. Rep. No. 969, 74th Cong. 1st Sess. 21. See also the identical language of H. R. Rep. No. 972, 74th Cong. 1st Sess. w1 and H. R. Rep. No. 1147, 74th Cong. 1st Sess. 23. And . . ."

" . . . The contention that Sec. 10(a) of the Wagner Act swept aside State law respecting the union shop must therefore be rejected . . ."

The Court continued, page 548, as follows:

"Section 10(a) of the Taft-Hartley Act, 29 USCA, Sec. 160(a), 9 FCA, Title 29, Sec. 160(a), which is set

forth in margin, contains important changes, but none requiring modification of the conclusions we have reached as to the corresponding section of the National Labor Relations Act. One phrase, however, reinforces those conclusions; that is the phrase "inconsistent with the corresponding provision of this Act."

"These words must mean that cession of jurisdiction is to take place only where State and Federal laws have parallel provisions. Where the State and Federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired. This reading is confirmed by the purpose of the provision in which the phrase is contained: to meet situations made possible by *Bethlehem Steel Corp. v. New York State Labor Relations Bd.*, 330 U. S. 767, 91 L. ed. 1234, 67 S. Ct. 1026, where no State agency would be free to take jurisdiction of case over which the National Board had declined jurisdiction."

It is true that the Supreme Court in the above case was discussing the relative jurisdictions of State and Federal jurisdictions in relation to the Taft-Hartley Act. Yet in principle we feel the case is important, because of the fact that the Board, here in its Brief, assumes that because it must of necessity determine coverage of the Act upon complaints of unfair labor practices being submitted to it, it thereby can relegate to itself the sole exclusive jurisdiction under the Declaratory Judgment Act of Congress, to determine coverage when the same is an issue before a Federal District Court in a proper controversy brought before the District Court, under 28 USCA, Sec. 400, now 28 USCA 2201 and Sec. 2202. A reading of Sec. 400 and Sec. 2201 and Sec. 2202 does not limit declaratory judgment in cases where there is a proper controversy concerning the application of the Taft-Hartley Act or any other Federal law. The

matter presented to the District Court simply involved a dispute as to whether or not under the facts alleged in the complaint, the activities of the Association and Union in the particular industry involves or "affects commerce" within the terms of Sec. 2(6) and (7) Labor Management Relations Act, 1947. That is as far as the Appellants desired the District Court to go in its declaration of rights under the complaint. The question is now asked: Where in the Taft-Hartley Act is any language used which indicates an intent of Congress to limit the Federal District Courts in affording declaratory relief, and making such relief available exclusively within the Board?

Since the action here did not involve an unfair labor practice insofar as the declaratory relief sought was concerned, we feel that the recent decision *Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd.*, U. S., 93 L. Ed. Adv. 10, 541, in principle answers Point I, A and B of Board's Brief, pages 13 to 23.

The statement found in Board's Brief, page 20,

" . . . The sole change made by the amended Act empowers the District Courts to decide these questions preliminarily but only when requested to do so by the Board, as an aid to proceedings pending before the Board. The failure of Congress to expand the jurisdiction of the District Courts beyond this is further evidence of the purpose of Congress to reaffirm the exclusive nature of the power conferred upon the Board to determine controversies concerning the coverage and meaning of the Act."

Under the above case of the United States Supreme Court this contention will not be true. If it were true under the

authorities cited by Counsel for the Board, it still would be applicable only to certain controversies involving unfair labor practices and not question of coverage.

The Amazon case cited in the Board's Brief and the case of *Gerry v. Superior Court*, 194 Pac. 2d 689, have no application on this appeal where the District Court was called upon under the Declaratory Judgment Act to determine a controversy concerning coverage under the Act. It is conceded in the Board's Brief that we are now only asking for a Declaratory Judgment, page 8. No unfair labor practice is here sought to be determined or enjoined.

Counsel for Appellee have been unable to produce one authority holding to the effect that 28 USCA, Sec. 400, now 2201, has been in anywise restricted by any provision of the Taft-Hartley Act.

In reply to Point II of the Board's Brief, pages 23 and 24, that the complaint was properly dismissed because appellant failed to exhaust a complete and adequate administrative remedy, it is pointed out that this position totally ignores the provisions of the Declaratory Judgment Act, 28 USCA, Sec. 400, now Sec. 2201, and particularly Rule 57 of the Federal Rules of Civil Procedure, which provides as follows:

" . . . The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate . . . "

We submit that Point II is fully answered by the case of *Oil Workers International Union, Local No. 463, et al v. Texoma Natural Gas Co.*, 146 Fed. 2d 62, decided Dec.

1, 1944, rehearing denied 3 Jan. 1945, certiorari denied 65 S. Ct. 1017, 334, U. S. 872, 89 L. Ed. 1426, rehearing denied. This was action brought under the Federal Declaratory Judgment Act by Company against Union to determine controversies under a contract of plaintiff with defendant, a hearing was held before National War Labor Board which declined jurisdiction on merits, but directed parties to arbitrate as provided in their contract.

The Court in that case, (5th Circuit) Lee, J., at page 65, (3) said:

“The National War Labor Board is not, under the law, vested with judicial functions, nor does it have the power to enforce its determinations, called “directives,” upon the parties to a controversy before it. It is not a substitute for the courts, and the pendency of a controversy before it is not a bar to a suit in the courts. This limitation upon its powers is recognized by it, for in its statement of its public policy respecting awards, dated September 10, 1943, it said:

“The Board’s determination of the matter will constitute a final adjudication unless and until a tribunal of competent jurisdiction issues rulings contrary to those of the Board. The action of the Board in no way prejudices the right of a party to appeal to a Court of competent jurisdiction a judicial declaration of the rights and obligations flowing from the award. The Board’s order will be made expressly subject to discontinuance should a Court render a decision contrary to the conclusions of the Board.”

“The Declaratory Judgment Act should be liberally construed, *Mississippi Power & Light Co. v. City of Jackson*, 5 Cir., 116 F. 2d 924, certiorari denied 312 U. S. 698, 61 S. Ct. 741, 85 L. Ed. 1133; and where a justifiable controversy exists between parties who are citizens of different states with regard to rights having

a value in excess of \$3,000, as here, the United States District Courts are vested with jurisdiction. The court below found that the controversy between the parties related to their rights and liabilities under their contract; that the parties had taken adverse positions with respect to their respective rights and obligations; that, therefore, a justifiable controversy existed, appropriate for judicial determination under the Declaratory Judgment Act. We agree. An employer may establish the seniority rights of an employee in dispute with other employees, as well as general rights which their contract relationship establishes, without waiting to be sued for breach or for damages or for specific performance, and thus secure an "interpretation of the contract during its actual operation" and stabilize an "uncertain and disputed relation." (Citing Borchard, *Declaratory Judgments*, 2nd Ed. 546) Exhaustion of the Administrative Remedies Granted by the War Labor Disputes Act, 50 USCA, Appendix Sec. 1507 et seq., and Executive Order No. 9017, of January 12, 1942, 50 U. S. C. A. Appendix Sec. 1507 note, to employer and employee is not a prerequisite to the bringing of a court action by either party for an alleged violation by the other of a labor agreement.

"The judgment appealed from is correct. It is accordingly affirmed."

This is a reasonable decision because Rule 57 of the Federal Rules of Civil Procedure provides: "... The existence of another adequate remedy does not preclude a judgment for declaratory relief in a case where it is appropriate ...". Even under the new Act, 28 USC 2201, discloses the intent of Congress to vest District Court with jurisdiction of the case at bar, "In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations

of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The Declaratory Judgment Act has been used as a remedy in many cases to determine the meaning of statutes and their application. For example, in *Tennessee Coal I & R Co. v. Muscoda Local No. 123*, 321 U. S. 590, 88 L. Ed. 610, 64 S. Ct. 698, the remedy was used to determine a problem of what constituted work or employment in underground iron ore mines within the meaning of Fair Labor Standards Act (Jan. 25, 1938) 52 Stat. 1060, c. 676, 29 USCA Sec. 201, 9 FCA Title 29, Sec. 201. The question was one of first impression, arising out of conflicting claims based upon the activities pursued and upon prior custom and contract in the iron ore mines.

Appellants contend that *Meyers v. Bethlehem Shipbuilding Corp.* 303 U. S. 41, 50-51, cited on page 24, Board's Brief, does not apply to sustain the contention that only Board has jurisdiction to entertain the declaratory relief here sought to determine coverage. That was a case for decision of whether a Federal District Court had equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in an unfair labor practice, prohibited by Labor Relations Act of July 5, 1935, Chap. 372, 49 Stat. at L. 449, 29 USCA, Sec. 151. That case can be distinguished:

1. That case involved an unfair labor practice prohibited

by the "Wagner Act," Labor Management Relations Act, 1935, and involved a matter then pending under the administrative jurisdiction of the Board; in the case at bar nothing has been filed nor is any issue before the Board, nor did either Appellants or Appellee invoke the jurisdiction of the Board, as neither party contended the existence of an unfair labor practice, or other conduct prohibited by the "Taft-Hartley Act." This matter before the District Court only involved a controversy relative to whether the industry in its negotiations for a new contract was governed by the rules of the "Taft-Hartley Act" or not, and this was based upon a disputed issue of facts of whether the industry was engaged in or affected interstate commerce.

2. Because under "Taft-Hartley Act," Sec. 10(a) has been changed to overcome the ruling in *Bethlehem Steel Corp. v. N. Y. State Labor Relations Board*, 330 U. S. 767, 91 *Led.* 1234, 67 S. Ct. 1026.

3. The above case was a case asking only for equity relief, and the absence of other adequate remedies before an injunction can be issued is required. The case at bar involves only an action for declaratory relief. It is true that an injunction was asked for, but only as an ancillary remedy and for no other purpose.

At first reading *Macauley v. Waterman Steamship Corp.* 327 U. S. 540, cited in Board's Brief, does sustain Board's contention (page 24, Brief) that general exhaustion of administrative procedure is required before threatened injury can be enjoined. But the case has no application here where the main issue is: Is the District Court empowered

to entertain a complaint for declaratory relief in proper controversy? That case can be distinguished on all the grounds suggested relative to the Myers case, and

2. Further the Waterman case decided only the question of Court's powers to issue injunctions prior to exhaustion of administrative procedures. The nature of that case determined the litigation when it was found the Court was not authorized to issue an injunction, for nothing else was sought by the complaint. Under this appeal, should this Court find the District Court was without jurisdiction to issue an injunction as an ancillary remedy to Appellants, for any reason, still it would not preclude the District Court from affording the declaratory relief sought by Association.

3. The Waterman case was limited to a consideration of the Myers case under the "Wagner Labor Act" and did not consider the amendments accomplished by the "Taft-Hartley Act."

4. In principle we feel this argument has been fully answered by the late United States Supreme Court's decision in *Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd.*, U. S., 93 L. Ed. 549. There is and can be no conflict in this case between the Board's jurisdiction under Sec. 10(a) of "Taft-Hartley Act" and the Federal Declaratory Judgment Act, because this Court could find that declaratory relief is proper in this case, and still find that the District Court was without jurisdiction to issue an injunction. If Appellants' complaint states a controversy appropriate for declaratory relief and should not have power to issue in-

junction, the complaint should still stand as far as the cause of action for declaratory relief is concerned.

This was essentially what has been decided in the case of *Maryland Casualty Company v. Pacific Coal & Oil Co.*, 312 U. S. 270, 85 L. Ed. 826. The District Court had sustained a demurrer to a complaint for a declaratory judgment by an insurer against insured and others to establish non-liability of insurer and a temporary injunction restraining the proceedings in State Court pending final declaratory judgment.

The Supreme Court of the United States held that there was a good complaint for declaratory relief alleging a proper actual "controversy." However, the Court held that the District Court did not have power to issue the injunction and remanded the case for further proceedings in conformity with the opinion.

Assuming for argument only that the Board's position be correct in this case and that the District Court had no jurisdiction to issue a temporary injunction to restrain or prevent what the Appellees contend to be unfair labor practices—Appellants contend this is not fatal to our right and the Court's power to entertain a complaint for declaratory relief in a proper case.

The case of *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, can be distinguished. The case was placed on the holding of the *Myers* and *Waterman* cases, holding in effect that the equity jurisdiction of the Federal District Court could not be invoked without first exhausting the administrative remedies—but since the injunction was the

only remedy sought in the action the denial of the Court's power to issue the injunction ended the litigation. It will be noted in that case the Court pointed out, at page 772, (This case did not involve the Labor Management Acts).

“Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress's commands for judicial restraint in this respect are not lightly to be disregarded.”

At page 91, L. Ed. 1805, 331 U. S. 765, the Court found,

“. . . the Internal Revenue Code in redetermining a deficiency in taxes. Moreover, Sec. 403(e)(1) commands: “The filing of a petition under this sub-section shall not operate to stay the execution of the order of the Board under sub-section (c)(2).”

“In the *Waterman Case*, taking account of these provisions, we said: “The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act . . .”

It is therefore clear that as an abstract proposition of law, the *Waterman* and *Aircraft* cases did not decide the point in the Board's Brief that only Board could determine coverage in spite of Federal Declaratory Judgment Act. Those cases merely held that in the acts under consideration it was the clear intent of Congress to make the administrative procedure exclusive. Nowhere in the Labor Management Relations Act of 1947, or the Declaratory Judgment Act,

is the Appellee able to so point out specifically where Congress so intended. The *Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd.*, U. S., 93 L. Ed. Adv. 10 541, held that Congress did not so intend at least in respect to unfair labor practices, which might be in addition to those set forth in Sec. 8 of the Taft-Hartley Act, in respect to the States to prevent other unfair labor practices.

The annotation in 173 A. L. R. 1427, relative to changes made in "Taft-Hartley Act" from "Wagner Act," points out:

"Sec. 35. JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD:

"Under the Wagner Act the power of the Board to prevent unfair labor practices was exclusive. This is now changed. The Board's power in this respect is not "to be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." As well be hereinafter pointed out, the Act provides remedies in certain cases before the courts at the instance of the parties. This section of the Act makes it clear that when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."

It is true that remedies to prevent unfair labor practices were concerned; and references made to the rights conferred by "Taft-Hartley Act" on persons to appeal in certain instances to the Courts, still nowhere in the Appellees' Brief do they point out where Congress has expressly limited the powers of District Courts under the Declaratory Judgment Act.

The arguments of the Board in its Brief under points I,

II and III, assume that the National Labor Relations Act, 1947, and Sec. 10 thereof—gives the Board exclusive jurisdiction to determine coverage when that matter is the subject of a proper controversy under the Declaratory Judgment Act, simply because this is a subsidiary matter to be determined when complaints are made to the Board under Sec. 8. This further assumes the presence in Section 10 of the provision, “and no Federal District Court under the Declaratory Judgment Act, shall ever exercise its power or give declaratory relief, when such application of the Act is the subject of a controversy, upon which the parties may have reached opposite views.” This is, of course, not true.

For the reasons stated above it follows that if this Court holds with the Appellants on Points I and II of the Board’s Brief, then its argument under Point III must fail, because it assumes exclusive jurisdiction of the Board. It is to be remembered that no unfair labor practice is present in the complaint because, by stipulation, the parts of the complaint were withdrawn by stipulation.

It is believed that we have sufficiently answered the entire Brief of the Unions in our answer to the Board’s Brief, above. One point, however, made in the Unions’ Brief to the effect that the matter is moot, requires an answer. (Unions’ Brief, pages 31 to end). This contention is based on the following contention in Unions’ Brief, page 32, “The record shows that the complaint on file in this action prays for an advisory opinion only and for legal advice on a contract that not only expired by its own terms but has also terminated by the acts of the parties.” This entire argu-

ment will not bear exploration, because a careful reading of the complaint disclosed that the old contract being about to expire gave rise to the negotiations for a new contract and that the controversy sought to be determined is whether the National Labor Relations Act of 1947, is applicable to the industry so that it would govern any new contract entered into between Association and Unions. This action did not seek to determine any rights or liabilities under the old contract which did expire before the Court rendered declaratory relief or ruled on the motions interposed by Appellees. The justiciable controversy before the court did not involve the old contracts, it involved whether or not under the facts alleged in the complaint in reference to the activities of the Association and Union in the industry came within the commerce provisions of the National Labor Relations Act of 1947. This impasse was entered into and opposite views taken by the parties, in respect to the new contracts under negotiation. For that reason the entire argument in respect to the question being moot is now well founded.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the case remanded for further proceeding, to-wit to determine after issue joined, the question of whether or not the Association and Unions and industries are governed by the National Labor Relations Act of 1947.

BROWN & WELLS
THEODORE HAUGH
A. DYER JENSEN

10 State Street
Reno, Nevada

for Appellants

No. 12152

United States
Court of Appeals
for the Ninth Circuit

WALTER A. SHAYLOR and GLADYS
SHAYLOR,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

MAR 28 1949

No. 12152

United States
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WALTER A. SHAYLOR and GLADYS
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Amendment to Complaint.....	7
Amended Judgment	15
Answer	5
Appeal:	
Certificate of Clerk to Transcript of Record on	20
Notice of	17
Order Extending Time to Docket.....	19
Order for Consideration of Exhibits in Original Form on	98
Statement of Points on (DC).....	17
Statement of Points on (USCA).....	97
Certificate of Clerk to Transcript of Record on Appeal	20
Complaint	2
Amendment to	7
Findings of Fact and Conclusions of Law (Submitted by Plaintiff and Rejected by Court)..	9
Findings of Fact and Conclusions of Law (Signed by the Court)	11

	PAGE
Judgment	13
Amended	15
Motion for New Trial	14
Names and Addresses of Attorneys.....	1
Notice of Appeal	17
Order Denying Motion for New Trial and Amended Judgment	15
Order Extending Time to Docket Appeal.....	19
Order for Consideration of Exhibits in Original Form	98
Statement of Points on Appeal (DC).....	17
Statement of Points on Appeal (USCA).....	97
Transcript of Proceedings	21
Witness for Defendant:	
Wagner, Dr. Carruth	
—direct	83
Witnesses for Plaintiffs:	
Finskley, Grace	
—direct	22
Shaylor, Catherine A.	
—direct	77
Shaylor, Gladys Catherine	
—direct	23
—recalled, direct	61
—cross	65
—redirect	70
—recalled, cross	80

Witnesses for Plaintiffs—(Continued)

Shaylor, Walter A.

—direct	72
—cross	74
—recalled, cross	92

Sullivan, Dr. John Robert

—direct	24, 34
—cross	42

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In the Southern Division of the United States
District Court, for the Northern District of
California

No. 26898-H

WALTER A. SHAYLOR, as Guardian Ad Litem
for GLADYS SHAYLOR,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, a sovereign
government, JAMES E. LUCAS, First Doe, Sec-
ond Doe, Third Doe, Fourth Doe, Fifth Doe,
Sixth Doe, Seventh Doe, Eighth Doe, Ninth
Doe, Tenth Doe, Eleventh Doe, Twelfth Doe,
Thirteenth Doe, Fourteenth Doe and Fifteenth
Doe,

Defendants.

PERSONAL INJURY SUIT UNDER
FEDERAL TORT CLAIMS ACT

To the Honorable Judges of the District Court of
the United States, in and for the Northern Dis-
trict of California:

I.

Plaintiff does not know the true names of de-
fendants sued as Does and prays leave to insert
herein said names when the same are ascertained
together with appropriate charging allegations.

II.

That Walter A. Shaylor is the father of Gladys
Shaylor, a minor, and that prior to the filing of the

complaint herein, Walter A. Shaylor by petition duly made was ordered and appointed [1*] guardian ad litem of said Gladys Shaylor.

III.

That on or about the 5th day of March, 1946, at or about the hour of 4:45 p.m. Gladys Shaylor was walking in the pedestrian walk in a westerly direction across Van Ness Avenue at the northerly corner where Van Ness Avenue and McAllister Street intersect, at said street and public thoroughfares in the City and County of San Francisco, State of California.

IV.

That at said time and place defendants negligently and carelessly drove a certain Dodge truck upon Gladys Shaylor.

V.

That said Dodge truck was the property of the United States Coast Guard, and was driven at all times herein mentioned by James E. Lucas, a member of the United States Coast Guard acting within the course and scope of his authority.

VI.

That by reason of the premises Gladys Shaylor received severe personal injuries, concussion of the brain and contusions and abrasions, fractured pelvis and lacerations about the entire body.

* Page numbering appearing at foot of page of original certified Transcript of Record.

VII.

That Gladys Shaylor has been generally damaged in the sum of \$25,000.

VIII.

That plaintiff brings suit under the Federal Tort Claims Act, Public Law 601, Title IV.

IX.

That by reason of the premises, plaintiff has been compelled to secure the services of physicians, surgeons, nurses and roentgenologists, and she has been damaged in this respect, therefore, to an extent presently undetermined, as said services are continuing, and plaintiff prays leave to insert the allegations of her monetary damages herein when determined.

X.

That by occupation Gladys Shaylor is a clerk, and by reason of the premises has been unable to work, to her damage in an amount unascertained as it is continuing.

Wherefore, plaintiff prays:

1. General damages in the amount of \$25,000;
2. Special damages as may hereinafter be alleged;
3. Cost of suit;
4. Any and other further relief which to the Court may seem meet and proper in the premises.

MELVIN M. BELLI,
Attorney for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Feb. 18, 1947.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and answering plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Defendant has no information or belief as to the allegations of paragraphs I and II and on such ground denies said allegations.

II.

Denies the allegations of paragraph III.

III.

Denies the allegations of paragraph IV.

IV.

Admits the allegations of paragraph V.

V.

Denies the allegations of paragraph VI.

VI.

Denies the allegations of paragraph VII.

VII.

Defendant is not required to answer paragraph VIII.

VIII.

Denies the allegations of paragraph IX.

IX.

Defendant has no information or belief as to the allegations of paragraph 10 and on such ground denies said allegations.

As for a second, separate and distinct answer

defendant alleges that the said Gladys Shaylor, a minor, was careless and negligent in and about the matters and things set forth in said complaint in that at the time and place of the event mentioned in said complaint said Gladys Shaylor, a minor, carelessly and negligently conducted herself without due or any care or caution for her own safety or precaution; that none of the injuries or damages claimed to have been sustained by said Gladys Shaylor, a minor, were caused by any acts of negligence on the part of the United States of America, or any of its agents, servants or representatives, but that the said negligence of the said Gladys Shaylor, a minor, was the sole and proximate cause of the injuries sustained by the said Gladys Shaylor, a minor.

WHEREFORE, defendant United States of America prays that plaintiffs take nothing by their complaint on file herein and that defendant have its costs of suit.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant United States
Attorney.

[Endorsed]: Filed July 16, 1947.

[Title of District Court and Cause.]

AMENDMENT TO PARAGRAPHS II, VII AND IX OF COMPLAINT

As amendments to paragraphs II, VII and IX of the complaint on file herein, plaintiffs allege as follows:

II.

That plaintiff Gladys Shaylor was born July 31, 1926, and that said plaintiff is now over twenty-one years of age.

VII.

That Gladys Shaylor has been generally damaged in the sum of \$75,000.00.

IX.

That by reason of the premises, plaintiffs were compelled to secure the services of physicians, surgeons, roentgenologists, hospitals, ambulances and other appliances, more particularly described as follows:

Hospital, St. Mary's	\$ 211.85
Dr. John Robert Sullivan, medical services	600.50
Dr. John Robert Sullivan, surgical, Feb. 26, 1948	250.00
Dr. August Spitalny, Pelvic Examinations	25.00
Dr. Frank W. Lusignan, medical.....	20.00
Ambulance to St. Mary's Hospital.....	7.00
Dress and suit cleaned.....	2.00
Stockings, torn	1.25
Twenty-eight days off work.....	187.38
Medicine to date.....	20.00

Total to date.....\$1,324.98

XI.

That plaintiff's attorneys are entitled to be allowed 20 per cent of any amount recovered, pursuant to section 944, Title 28, USCA.

Wherefore, plaintiffs pray:

1. General damages in the sum of \$75,000.00;
2. Special damages in the sum of \$1,324.98;
3. Costs of Suit and attorney fees as alleged hereinabove;
4. Any other further general relief which to the court may seem proper.

MELVIN M. BELLI,

/s/ WILLIAM E. GEARHART,
Attorneys for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed April 13, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Submitted by Plaintiff and Rejected by Court

The above entitled cause came on regularly for trial on the 12th day of April, 1948, before the Court sitting without a jury, Melvin M. Belli and William E. Gearhart, appearing as attorneys for the plaintiffs and Frank J. Hennessy and C. Elmer Collett, appearing as attorneys for the defendant and evidence both oral and documentary having been introduced and the cause submitted after two and one-half days of trial for decision, the Court now makes its findings of fact as follows:

FINDINGS OF FACT

1. That it is true that Walter A. Shaylor is the father of Gladys Shaylor; and that Gladys Shaylor was born July 31, 1926, and is now an adult;

2. That it is true that on March 5, 1946, at about the hour of 4:45 p.m., Gladys Shaylor was walking in the pedestrian walk in a westerly direction across Van Ness Avenue at the northerly corner where Van Ness Avenue and McAllister Street intersect and that said Van Ness Avenue is a public thoroughfare in the City and County of San Francisco, State of California;

3. That it is true that at said time and place defendant negligently and carelessly drove a certain Dodge truck into and upon Gladys Shaylor;

4. That it is true that said Dodge truck was the property of the United States Coast Guard and was driven at all times herein mentioned by James E. Lucasa, member of the United States Coast Guard acting within the course and scope of his authority;

5. That it is true that by reason of the premises Gladys Shaylor received severe personal injuries, concussion of the brain and contusions and abrasions, fractured pelvis and lacerations about the entire body; and that said injury to her head and pelvis is permanent;

6. That it is true that plaintiffs brought this action under the Federal Tort Claims Act, Public Law 601, Title IV;

7. That it is true that by reason of the premises, plaintiffs have secured the services of physicians, surgeons, roetgenologists, hospital and other medical attention; and have been specially damaged in the sum of \$1,324.98 by reason thereof;

8. That it is true that Gladys Shaylor has suffered general damages in the sum of \$35,000.00 by reason of the premises;

9. That it is not true that Gladys Shaylor was guilty of contributory negligence at said time and place.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts, the Court finds:

That the plaintiffs are entitled to a judgment against the defendant United States of America, a

sovereign government, in the sum of \$36,324.98, lawful money of the United States of America, together with their costs of suit and that the fees of the attorneys for the plaintiff are hereby fixed at 20% of the amount of said judgment, to be deducted therefrom.

Judgment is hereby ordered to be entered accordingly.

Dated....., 1948.

.....

Judge, Said United States
District Court.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 12th day of April, 1948, before the Court sitting without a jury, Melvin M. Belli and William E. Gearhart, appearing as attorneys for the plaintiffs and Frank J. Hennessy and C. Elmer Collett, appearing as attorneys for the defendant and evidence, both oral and documentary, having been introduced and the cause submitted for decision, the Court now makes its findings of fact as follows:

FINDINGS OF FACT

1. That it is true that Walter A. Shaylor is the father of Gladys Shaylor; and that Gladys Shaylor was born July 31, 1926, and is now an adult;
2. That it is true that on March 5, 1946, at about

the hour of 4:45 p.m. Gladys Shaylor was walking in the pedestrian walk in a westerly direction across Van Ness Avenue at the northerly corner where Van Ness Avenue and McAllister Street intersect and that said Van Ness Avenue is a public thoroughfare in the City and County of San Francisco, State of California;

3. That it is true that at said time and place defendant negligently and carelessly drove a certain Dodge truck into and upon Galdys Shaylor;

4. That it is true that said Dodge truck was the property of the United States Coast Guard and was driven at all times herein mentioned by James E. Lucas, a member of the United States Coast Guard acting within the course and scope of his authority;

5. That it is true that by reason of the premises Gladys Shaylor received certain bodily injuries.

6. That it is true that plaintiffs brought this action under the Federal Tort Claims Act, Public Law 601, Title IV.

7. That it is true that by reason of the premises plaintiffs have secured certain medical and hospital attention, and there was also slight damage to Plaintiff, Gladys Shaylor's clothing, and plaintiffs have been specially damaged in the sum of \$460.25.

8. That it is true that Gladys Shaylor has suffered general damage in the sum of \$500.00 by reason of the premises.

9. That it is not true that Gladys Shaylor was guilty of contributory negligence at said time and place.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts, the Court finds:

That the plaintiffs are entitled to a judgment against the defendant United States of America, a sovereign Government, in the sum of \$960.25, lawful money of the United States of America, together with their costs of suit, and that the fees of the attorneys for the plaintiffs are fixed at 20% of the amount of said judgment,

Judgment is ordered to be entered accordingly.
Dated May 7, 1948.

CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed May 7, 1948.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26-898-H

WALTER A. SHAYLOR, as Guardian ad litem
of GLADYS SHAYLOR and GLADYS SHAY-
LOR,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having heretofore been submitted to the Court upon the pleadings and the evidence adduced by the respective parties, and

The Court having thereafter made its findings of fact and stated its Conclusions of Law,

It Is Hereby Ordered and Adjudged, that the Plaintiffs have and recover of and from the defendant United States of America, the sum of \$960.25, lawful money of the United States of America, and that twenty per cent of said amount shall be allowed as attorneys fees.

Dated May 7, 1948.

CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed May 7, 1948.

Entered in Civil Docket May 7, 1948, Vol. 5,
Page 421.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To the Honorable District Court of the United States and to Frank J. Hennessy, Attorney for the United States of America, above named defendant:

Please take notice that the plaintiffs above named intend to and do hereby move the said Court to modify its decision rendered in said action, in part, viz: as to damages, general and special, and to grant a new or further trial on part of the issues in said action, viz: as to the damages, general and special, for the following grounds, to wit:

1. Insufficiency of the evidence to justify the decision and that the decision is against law.

2. Error in law occurring at the trial and excepted to by said plaintiffs, the party making this application.

Said motion will be based upon this notice of motion, and the minutes, files, evidence and records in the above-entitled action and court.

Dated: May 12, 1948.

MELVIN M. BELLI,
/s/ WILLIAM E. GEARHART,
Attorneys for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed May 17, 1948.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL AND AMENDED JUDGMENT

The motion of plaintiffs for a new trial on part of the issues, namely: general and special damages having come on regularly to be heard and the matter having been argued and submitted on briefs only to the court for decision and the matter having been fully considered, the Court now finds, as it did formerly that no deduction should be made, nor was there any intention, at any time, on the part of the Court to make any deduction in the amount allowed as damages by reason of any accident insurance, or other insurance carried by the plaintiff Gladys Shaylor, at the time of the occurrence under consid-

eration herein; and, the Court further finds now, as it did at the time of the trial that there was no permanent injury to Gladys Shaylor by reason of the accident involved herein; and the Court further finds, however, at this time, that the amount allowed as general damages, because of certain bodily injuries received by the plaintiff Gladys Shaylor, should be increased in the amount of \$500.00, making the amount allowed as general damages \$1000.00.

It Is Ordered that the Plaintiffs do have and recover from defendant United States of America, the sum of \$1000.00, as general damages and the further sum of \$460.25, as special damages, making a total judgment of \$1460.25.

It Is Further Ordered said motion for new trial be and it is hereby denied.

Done in Open court this 7th day of September, 1948.

CHASE A. CLARK,

Judge of Said United States
District Court.

[Endorsed]: Filed Sept. 9, 1948. Entered in Civil Docket Sept. 9th, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Walter A. Shaylor and Gladys Shaylor, plaintiffs in the above-entitled action, hereby appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, viz (1) from that part only of that certain judgment entered and filed herein May 7, 1948, determining the amount of damages, general and special, to be awarded to said plaintiffs; and, (2) from that part only of that certain amended order or judgment entered and filed herein September 9, 1948, determining the amount of the damages, general and special, to be awarded to said plaintiffs.

Dated: October 25, 1948.

MELVIN M. BELLI,

/s/ WILLIAM E. GEARHART,

Attorneys for Said Plaintiffs and Appellants.

[Endorsed]: Filed Oct. 25, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL FOR APPELLANTS

1. The decision of the court as to the general damages is not supported by the evidence, is contrary to law and is not sustained by the evidence.
2. The decision of the court as to the special damages is contrary to law and not sustained by the evidence. The wrongdoer is not entitled to have the special damages for which he is liable reduced by proving that plaintiff has received compensation for

the loss from a collateral source, wholly independent of him. Under this rule, it is error for the trial court to admit evidence of accident insurance or any other insurance in behalf of the injured person to mitigate the damages.

3. In assessing damages, the court must consider the continued and recently accelerated depreciation of the purchasing value of the dollar.

4. A finding of the amount of damages by the court should be set aside where the amount recoverable was purely a matter of computation and where the computation was incorrect.

5. A judgment for the amount awarded cannot be sustained where the judgment was wrong on any reasonable hypothesis.

6. Where the findings of the court are based on undisputed evidence, any question as to the sufficiency of the evidence to sustain the findings is one of law and in consequence reviewable by the appellate court.

7. If the findings are manifestly erroneous, the judgment should be reversed.

8. Findings should be set aside where the trial court erroneously admitted evidence not competent or relevant or material to the issue.

9. Refusal to make findings as requested will be reviewed where the rejected findings are presented by the record on appeal.

10. Appellate court can order a retrial on a limited issue or issues, if that issue or issues can be separately tried without such confusion as would amount to a denial of a fair trial.

Respectfully submitted,

MELVIN M. BELLI,

/s/ W. E. GEARHART,

Attorneys for Plaintiffs and
Appellants.

[Endorsed]: Filed Nov. 10, 1948.

[Title of District Court and Cause.]

ORDER

Notice of appeal having been filed in the above-entitled cause on the 25th day of October, 1948, and it now appearing to the Court that it is necessary that appellant have additional time beyond the forty days provided for the docketing of their appeal;

It Is Therefore Ordered that the said time within which the appellants may docket their appeal in the above-entitled cause be extended an additional fifty days from and beyond the 2nd day of December, 1948.

Dated this 27th day of November, 1948.

CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed Nov. 29, 1948.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to . . . , inclusive, contain a full, true and correct transcript of the records and proceedings in the case of Walter A. Shaylor, as Guardian Ad Litem of Gladys Shaylor, Plaintiffs, vs. United States of America, a sovereign government, James E. Lucas, et al., Defendants, No. 26898 H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.30 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of January, A.D. 1949.

[Seal]

C. W. CALBREATH,
Clerk.

In the District Court of the United States, Northern District of California, Southern Division

No. 26,898-H

WALTER A. SHAYLOR, et al.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT

This matter was heard before the Honorable Chase A. Clark, United States District Judge, sitting with a jury, at San Francisco, California, on April 12, 1948.

Appearances: W. E. Gearhart, Esq., 240 Stockton St., San Francisco, California, Attorney for the Plaintiff. C. Elmer Collett, Esq., Assistant United States District Attorney, of San Francisco, California, Attorney for the Defendant.

The Court: Yes, I think the complaint may be amended.

Mr. Gearhart: I will stipulate that it is deemed denied. Paragraph two of the amendment states: "That plaintiff [3*] Gladys Shaylor was born July 31, 1926, and that said plaintiff is now over twenty-one years of age."

The amendment to paragraph seven "That Gladys Shaylor has been generally damaged in the sum of \$75,000.00 and paragraph nine I have

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

changed the amount of special damages to \$1,324.98.

The Court: The amendment may be filed.

* * *

GRACE FINSKLEY,

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Gearhart:

Q. What is your occupation?

A. Record librarian.

Q. Of what hospital?

A. St. Mary's Hospital.

Q. San Francisco? A. Yes, sir.

Q. The director authorized you to bring the hospital record of Gladys Shaylor?

A. Due to a subpoena served upon us.

Q. Do you have those records? [4]

A. Yes, sir.

Q. Do you know about the preparation of those records?

A. When a patient is admitted there is a complete record kept and after the patient is discharged the record comes to my custody.

Q. Those records are made in the regular course of business of the hospital? A. Yes, sir.

Q. At the time of the treatment of Miss Shaylor, between the dates named therein?

A. Yes, sir.

Q. You have the x-ray? A. Yes, sir.

Mr. Gearhart: I offer these records and x-ray in evidence.

Mr. Clerk: The record is marked as plaintiff's

(Testimony of Grace Finskley.)

exhibit 1 and the x-ray marked as plaintiff's exhibit 2.

Mr. Collett: May I inquire of the witness?

The Court: Yes, you may.

Q. (By Mr. Collett): What period of time does this cover?

A. The date of hospitalization of the first sheet is March 5 through March 21. This sheet I have typed I would like to have signed by the Clerk. [5]

* * *

GLADYS CATHERINE SHAYLOR,

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Gearhart:

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. On March 5, 1946, were you injured in San Francisco? A. Yes, sir. [9]

* * *

Q. How long had you been working at this place?

A. I started working at the Internal Revenue,——

Q. ——I mean at 100 McAllister. [10]

A. I had been working there about five months.

Q. When you left high school you started to work? .

A. Yes, I started to work right away after that.

* * *

A. I walked up McAllister to the corner of

(Testimony of Gladys C. Shaylor.)

Van Ness and I waited for the signal "go" to cross on the walk to the safety zone and board the car. I stepped off the curb when the signal said "go" and I don't remember anything after that.

Q. Where were you when you regained consciousness?

A. In the emergency hospital. [11]

* * * *

DR. JOHN ROBERT SULLIVAN,
being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Gearhart:

Q. Where did you receive your medical education?

A. University of California and Creighton Medical School, Omaha.

Q. How long have you been admitted to practice? A. Since 1932 in California.

Q. You practiced the entire time in California?

A. Yes, sir.

Q. And the nature of that practice?

A. Standard internship in San Francisco Hospital, Residency in San Francisco General Hospital; the third year in San Francisco Hospital and subsequently in industrial practice with Doctor Cox, since 1939 my own surgical practice.

Q. Your practice consists of what? •

A. Surgery and traumatic surgery.

Q. You have been the family physician for Gladys Shaylor and Walter Shaylor, the father?

(Testimony of Dr. John Robert Sullivan.)

A. I have attended these people since I left the San Francisco County Hospital, where I first met them through associates out there.

Q. You have handled their medical problems since that time?

A. Yes, such as came in my field. [25]

Q. What period of time was that?

A. Since 1935, previous to that time I had seen them and their friends at the San Francisco hospital.

Q. Doctor, do you recall being called to the emergency hospital on March 5, 1946, to see Gladys Shaylor?

A. Yes, about six o'clock I was called.

Q. Did you go? A. Yes, sir.

Q. State what you found?

A. The patient was examined in bed, having been placed there following receipt at the hospital having arrived by ambulance. She was unconscious and bore evident signs of recent trauma, the most important factor was a large hematoma developing over the right side of the scalp and she showed signs of cerebral concussion; she was in moderate shock. There was a question of internal injury because of the condition of the bony pelvis. Arrangement was made and I had her transferred to St. Mary's Hospital.

Q. You treated her there? A. Yes, sir.

Q. Tell the Court your findings?

Mr. Collett: I object to this, there is no foundation laid as to sequence of the events, this is ambiguous.

(Testimony of Dr. John Robert Sullivan.)

The Court: I take it that the Doctor, in his words can tell the condition he found there. You may proceed. [26]

A. I see the information here in my writing, over my signature, under the classification of "working diagnosis," to this effect: Cerebral concussion, contusion scalp, contusion right shoulder, possible fractured pelvis, contusion bladder, multiple contusions and abrasions and strains of extremities. The patient was admitted under those conditions and treatment instituted by me that night. The treatment was extensive.

Q. Was she conscious or unconscious?

A. She was stuporous.

Q. What time was this?

A. Six forty-five or seven,—I would say 6:45 to 7:15 following her admission.

Q. How long were you there?

A. About three and a half hours at that time, working on the patient.

Q. Did she regain consciousness at that time?

A. She could be roused but it was not until the following morning that she was truly cognizant of her surroundings. She showed evident signs of cerebral irritation and on the basis of neurological examination a diagnosis of concussion was made. Her condition was such as to not warrant x-ray at that time although I ascertained that she had no cerebral depression. We were able to move her next morning and took x-rays. Because of the evident condition during the interval and the develop-

(Testimony of Dr. John Robert Sullivan.)

ing of the blood clot in the abdominal area the patient was watched [27] for injury to the bowel or genital urinary system. We ascertained that she had not had a rupture of the spleen or kidney through tests and I ascertained she had not ruptured her bladder. The trauma being to the lower front of the abdomen she evidence fracture without gross deformity of the pelvis because of ability to induce pain and increased relaxation of the pelvis to pressure, didn't show gross fracture; this was subsequently checked. The contusions and abrasions were in turn treated temporarily; such medication as indicated was given to control patient during first night. I had at my disposal copy of Department of Public Health record made in the normal manner and included in that file which is forwarded in such cases to the attending physician. At the Emergency Hospital the patient was examined by Doctor Penn and it is noted that the attending physician was notified and that Doctor Sullivan had sent the patient to St. Mary's Hospital. This report can be substantiated and was acceptable to me.

Q. This report of what, Doctor?

A. Report of Doctor Penn, of his findings in relation to his investigation of the patient when she was brought to the hospital. It is included in our hospital record.

Mr. Collett: Now, if the Court please, I shall object to this witness testifying to any other report.

The Court: Yes, just what you found, Doctor.

A. My findings at the Emergency Hospital and

(Testimony of Dr. John Robert Sullivan.)

on the night [28] of the injury have been mentioned before, specifically they are hematoma over the right skull, evident head injury, contusions and strains of the right shoulder, right upper extremity, trauma to the lower abdomen with large blood clot developed in the lower abdominal wall, fracture of the pelvis, contusions and abrasions on the lower extremities, particularly to the right ankle.

Q. Did you have x-rays taken? A. I did.

Mr. Collett: I object to the answer and ask that a portion be stricken. He testified it was his observation at the time he made the examination after the patient went to St. Mary's,—I object to it to the extent that he states now there was a fracture and before he stated there was no fracture.

A. The clinical evidence is such as to indicate a fracture.

Q. Did you have x-rays taken at the time?

A. The following day.

Q. Doctor, I show you exhibit 2 marked, will you examine this and state what it is?

A. X-ray; these are taken March 6, 1946, including an x-ray of the shoulder, girdle, skull and pelvis.

Q. I show you exhibit 3 marked for identification, look at this,—first I might say Mr. Collett and I agree that at the time the Government examined Plaintiff Gladys Shaylor they asked us for the x-ray from St. Mary's and certain [29] x-rays were taken to the Marine Hospital. These were delivered to our office and the record girl from the hospital didn't bring these. Now, will you examine

(Testimony of Dr. John Robert Sullivan.)

these and tell us when these were taken and where?

Mr. Collett: I object to any self-serving declaration by counsel as to what transpired.

The Court: It seems to me it is just a question of identification, you may proceed.

A. The latter group are those under date March 20, 1946, and September 27, 1947, taken at St. Mary's Hospital at my direction of this patient, Gladys Shaylor.

Q. What about this?

A. That is March 27, 1946.

Q. At St. Mary's Hospital?

A. Yes, sir. There are two views of the pelvic structure, and the third view which was a specific detailed picture of the bladder.

Mr. Gearhart: I offer this in evidence as exhibit 3.

The Court: It may be admitted.

Q. Doctor, I show you envelope of x-rays will you tell the Court where those were taken?

A. This patient was referred to Doctor August Spitalny by me. These pictures were taken at his direction.

Q. What date? [30]

A. These two were taken March 20 and should be with this single film dated March 20. They were taken at St. Mary's.

Mr. Gearhart: May we offer this also as exhibit 3?

Mr. Collett—I will object—

The Court: —Keep these in order now, what are those, Doctor?

(Testimony of Dr. John Robert Sullivan.)

A. These are the films that the Government had.

The Court: They are taken at the time mentioned and are of the patient?

A. Yes, sir.

The Court: Proceed with your examination.

Q. What time were these taken?

A. March 20, at St. Mary's. That is March 20, 1946.

Q. And the rest in this envelope?

A. These were films taken by Doctor Levitian at the request of Doctor Spitalny and was done for the study of the urinary system.

Q. How many are there?

A. Six sets.

Q. And when were these taken?

A. June 6, 1946.

Q. At your direction?

Mr. Collett: He told us that.

Mr. Gearhart: We offer these in evidence. [31]

The Court: Have you seen the exhibit?

Mr. Collett: Yes, I have seen them.

The Court: And they are of this patient, are they, Doctor?

A. Yes, sir, they are.

The Court: They may be admitted. I think this is exhibit numbered 6.

Q. Showing you all three of these, Doctor, which x-ray show what you have testified to, or have you testified here as to a fracture?

A. Well, the sequence of events in the course of investigations was to determine if the patient

(Testimony of Dr. John Robert Sullivan.)

had a fractured skull. The film under date of March 26 reveals the cranial suture markings but no evident fracture or depression. This (indicating) is a lateral projection—this is a similar lateral projection to get the depth that cannot be demonstrated on this machine. This (indicating) is an anterior-posterior projection and shows no evident fracture of the skull, though we were able to see some increase density due to effusion of blood into the scalp which would explain the hematoma. This (indicating) is the left lateral as compared to the right lateral, it is negative as to fracture. This is another anterior-posterior projection and it is negative for fracture. This (indicating) is a picture of the right shoulder and reveals no fracture. The [32] humerus is indicated here (indicating) and there was some swelling and contusions. This is a complement picture of the same shoulder. Now, this is an x-ray taken of the bony pelvis, used for stereoscopic examination; that reveals some widening in this area of the pelvis. The maximum pain on examination was at the level of the symphysis here (indicating). There is an irregularity to the plane of the true pelvis here and suggests that the patient had a tearing or wrenching force resulting in the pulling apart of the bone.

Q. Doctor, what is the natural condition?

A. This is not a movable joint. The joint is formed by the close proximation of two bones, held firmly together by tough ligament structure. The separation here is approximately 4 mm.

(Testimony of Dr. John Robert Sullivan.)

whereas it should be less than 1 mm. There is no other injury indicated to the true pelvis, but it did confirm the injury to the symphysis pubis.

Q. And what is the effect, or how does that affect the motion of the individual? In her natural motion Doctor, how does that affect her?

A. At this moment there was an instability of the pelvis itself through which all the weight of the body is transmitted. There was a disruption of this unit as compared to this (indicating). That would account for the pain radiating down the leg and account for the pelvis seeming to move. This is a picture taken on September,—I don't [33] see the date,—September 1947, to ascertain what change had occurred in the bony apposition; the patient wearing a garment for the continued stability of the pelvis, with some small loss here, that is the change noted here at this point (indicating). This is a larger film and shows the disproportion of the plane or curve here which indicates a disruption of the symphysis pubis. These were taken September 27, 1947. Included in this group was a single film which was taken while she was hospitalized; this is one of a series, the others being included in this other envelope. This was taken before an opaque substance was introduced into the bladder. These two films (indicating) were taken at the same time and show the ordinary bladder extended and no evident leakage out into the surrounding tissue which is sufficient indication that the bladder gave no signs of rupture. This pro-

(Testimony of Dr. John Robert Sullivan.)

jection is a lateral view where we are able to see the posterior aspect of the bladder and again there is no evident leakage of the bladder itself. This (indicating) is a set of films taken at the request of Doctor Spitalny for genito-urinary investigation. They are pictures of the kidney function, the kidney to the bladder function. This was taken following the introduction of intravenous dye, shows the characteristics of the urinary system in draining from the kidney through the ureter into the bladder; this (indicating) is an outline of the kidney as you see. [34] The kidneys are diagnosed as working normally. The dye entered the bladder without interruption. The full series were a repetition of this. This is at a later period of time showing more of the dye in the bladder and this is a similar picture to the one shown before and taken five minutes later. This is a flat plate and this is another film showing more dye in the bladder. That is a summation of the x-rays.

Mr. Collett: Which of the x-rays were turned over to the Marine Hospital?

Mr. Gerhart: Exhibit 4.

A. In 1946 the films were put in the file and I gave an order to have all the films given to the Government. The original films I think were seen by the Government representatives at St. Mary's in 1946. The only difference here is that this single film should have been in with the others.

Mr. Collett: Those are the ones given to the Government?

(Testimony of Dr. John Robert Sullivan.)

A. Yes, as near as I can ascertain.

The Court: We will recess at this time until 2 this afternoon.

2 o'clock p. m., April 12, 1948

DIRECT EXAMINATION (continued)

Q. Doctor as I remember you said you had been the physician [35] for the plaintiff for a number of years? A. Yes, sir.

Q. Will you tell the Court of any operations or treatment prior to this date, October 5, 1946, by you, Doctor?

A. You mean March 5, 1946.

Q. Yes, March 5th, tell of any operations or treatment?

A. May I have recourse to my notes?

The Court: Notes made at the time of the treatment or operations, yes, you may refer to them simply to refresh your memory.

A. About, let's see, primary form of therapy was directed to this individual on August 6, 1943, at which time this patient was seventeen years of age——

Q. —For what was that, Doctor?

A. As I say, at which time she was seventeen years of age, she was brought to my office and the history and findings were those of recurrent appendicitis; the patient was noted to have mild pyelitis in association with her symptoms of appendicitis. As of August 1943 following adequate observation a later diagnosis of terribly inflamed

(Testimony of Dr. John Robert Sullivan.)

appendix; medical management having been instituted the patient continued to present symptoms of appendicitis and she was brought to me on August 23, 1946, and at that time a chronic appendix was encountered and removed and the patient had a normal convalescence to discharge. Following that, in about a month, it was in October 1943 the patient again was [36] brought to me by her mother, at which time she was having some gastric upset diagnosed as gall bladder trouble; adequate tests confirmed this. The patient was placed on a diet and medical management for gall bladder which we have continued to date. In January 1944 because of evident obesity and menstrual difficulty; pain following menstruation, a basal metabolism was done to find her thyroid condition; this was found deficient and she was placed on therapy. This reduced the congestion of her female organs. The medication was supplemented by instruction to the mother to carry on the treatment at home. There was a minor accident in June 1945, a fall to her buttocks, x-ray taken were negative to fracture or pathological change, this required treatment and she was discharged on June 18, 1945. In the interim from June, 1945, until my entrance into the case for treatment because of this injury, the patient was only on the gall bladder management and thyroid treatment as was discussed with her mother.

Q. Doctor, in view of your education, training and experience and the history of this case, could

(Testimony of Dr. John Robert Sullivan.)

you express an opinion as to whether there is any relationship between the gall bladder trouble and the injury she sustained and suffered on March 5, 1946?

A. There has been no trauma to the area of the gall bladder. The gall bladder is not involved in this condition, as such. [37]

Q. There is no logical relationship between this gall bladder trouble and the injury of March 5, 1946?

A. No. She had the gall bladder symptomology antedating her injury.

Q. Doctor, tell the Court whether or not she has had any surgical attention by you since March 5, 1946, or in the first part of 1948?

A. Yes, this patient was brought to me.

Q. Tell the Court the history of that?

A. On February 2, 1948, the patient reported to my office; she complained of acute abdominal pains,—originally on January 27, 1948,—that occasioned careful examination upon which it was found that she had pain of considerable intensity in the left lower quadrant of her abdomen; a tentative diagnosis of Meckles Diverticulum; a very careful examination and x-ray being made to confirm the symptoms complained of. The patient sustained increasing distress and was placed in St. Mary's hospital February 9 because of some bowel obstruction, or bowel obstructive symptoms. She was operated and obstruction found in her small bowel approximately 19 or 20 inches from the terminal end of the small bowel. The patient

(Testimony of Dr. John Robert Sullivan.)

made an uneventful recovery at that time and I feel has recovered from the effects of the surgery. However several things were noted during that procedure.

We noted replacement by scar tissue to a great extent of the muscular tissue and facia which I attributed to the [38] marked bleeding of the abdominal wall sustained in March 1946.

Q. Sustained March 5, 1946?

A. Yes, sir, and found on March 5, 1946.

Q. Doctor, in your opinion would that require an operation to correct that situation?

A. Yes, sir.

Q. Doctor, what would you say would be a reasonable charge for such an operation?

A. That operation which was done and the diagnosis which I classed being due to an obstruction of the small bowel the ordinary charge would be \$250.00 for that phase of it.

Q. Now, Doctor, from your treatment of Gladys Shaylor can you state from your knowledge and experience as a medical man, as a practicing physician whether or not you found any present kidney or bladder symptoms?

A. The patient at the present time no longer demonstrates the original defects. The bladder function is restored to normal in so far as capacity is concerned. The patient does express pain in relation to her bladder at the present time but it is not so much pain of the bladder as it is the structure overlying the bladder and inner abdom-

(Testimony of Dr. John Robert Sullivan.)

inal wall and symphysis pubis wherein she sustained her bony injury.

Q. Doctor, did you prescribe any belt for the relief of this pain? [39]

A. The patient before being discharged in 1946 was fitted for a supportive garment to be worn constantly as a substitute for a cast to control her pelvic injury.

Q. Before she left the hospital?

A. Yes, sir.

Q. Can you state whether or not she was confined to bed after leaving the hospital?

A. The patient was transferred out of the hospital on account of the bed load and sent home and not permitted to come to my office for approximately two weeks for the institution of physiotherapy.

Q. Considering your education, experience and the history of this case could you express an opinion as to whether there is a permanent injury to the plaintiff Gladys Shaylor with reference to her pelvis, her symphysis pubis?

A. From the separation which I have explained as shown in the films, this has given rise to some instability in the pelvic ring which accounts for the pain, on any jarring motion, through the lower extremities, any turn of the body will produce pain in the neighborhood of the symphysis pubis, in what should be a solid joint.

Q. Could you state that would be permanent?

A. Because of the lapse of time since the date of the injury and the improvement noted, I would

(Testimony of Dr. John Robert Sullivan.)

say the condition today in relation to the pelvis is permanent, that is, as to the symphysis pubis.

Q. Now, Doctor, before I show you this,—let me ask you [40] if in your opinion, taking into consideration your training, experience and the history of this case, can you express an opinion with reference to the head injury, the concussion which you described, whether she will have headaches permanently?

Mr. Collett: We object to that question, it does not state all the elements if he is asking a hypothetical question—

The Court: —I don't think this is in the form of a hypothetical question, and if the Doctor understands the question he may answer.

A. I think I can answer.

The Court: Very well.

A. The patient on primary examination presented hematoma over the right side of scalp, right parietal region. It was evident that the patient had been struck on the scalp to produce the hematoma there, and there were certain neurological findings, irrationability, indicating a degree of cerebral concussion, at no time did she demonstrate any definite localizing lesion wherein one could say the motor area was affected, but she did have, over a period, progressively decreasing headaches in the right temple area. Industrially we anticipate that following an unconscious period due to head injuries, then the patient may or may not have a visible degree of post-traumatic headache usually localized in the same area as the

(Testimony of Dr. John Robert Sullivan.)

trauma for an indefinite period. This patient's frequency of headaches is gradually decreasing, which is a good sign. [41]

Mr. Collett: I ask that the whole answer be stricken, there is no foundation laid as to what her symptoms were, no foundation as to her treatment, so far as the treatment of the Doctor is concerned there is nothing as yet to disclose what that treatment was?

The Court: I thought he gave us the condition of her head at the time of the accident, I may not have understood it.

A. Yes, in the hospital record I stated a cerebral concussion and hematoma of the scalp as one of the findings and diagnosis.

The Court: The answer may stand.

Q. Now, Doctor, I show you a statement on your stationery and I would like at this time to have it marked for identification.

(Whereupon document was marked by Clerk.)

Q. Now I wish you would look at plaintiff's exhibit 7 marked for identification, examine it and tell the Court whether that represents reasonable charges for your services covering the period from March 5, 1946, to the present time.

A. I think this is a reasonable charge and this is based on the Industrial Accident Commission fee schedule.

Mr. Gearhart: I offer it in evidence.

Mr. Collet: I object to that. Is this a schedule of the commission fees or it is the Doctor's charges.

(Testimony of Dr. John Robert Sullivan.)

Q. Doctor, did you prepare that?

A. This is prepared in my office by my secretary, it is for emergency treatment, treatment for shock at the emergency hospital, treatment at St. Mary's hospital care and attention 3/5/46 to and including 3/22/46. Orthopedic management; fractured pelvis, right shoulder injury, right leg and right leg injury; genito-urinary treatment and investigation neuro-surgical management, and hospital calls. There are three items in 1946, 1947 and one in 1948 arising directly out of the injury sustained in addition to charges for certain medical transcripts requested of me in this case.

Mr. Gearhart: I offer that in evidence.

Mr. Collett: I object to it on the ground that it is not established as to when these charges were prepared and whether or not they have been paid by the plaintiff.

The Court: Is that the charge you made to her?

A. Yes, sir, these charges (indicating).

The Court: That is what she owes you?

A. Yes, sir, and as noted here, medical reports requested and testimony in Court.

The Court: Exhibit 7 may be admitted.

Mr. Gearhart: I will read this at this time.

"Miss Gladys Shaylor, 119 Hampshire St., San Francisco, California.

"For professional services rendered, and this is dated [43] April 12, 1948.

"3/5/46 Emergency Hospital. Examination, emergency treatment, treatment for shock. 3/5/46 St. Mary's hospital care and attention 3/5/46 to

(Testimony of Dr. John Robert Sullivan.)
and including 3/22/46. Orthopedic management; fractured pelvis, right shoulder injury, right leg and right ankle injury. Genito-urinary treatment and investigation; neuro-surgical management. Hospital calls, \$200.00.

“Medical management 2/23/46 to and including 12/31/46. Examination, physiotherapy, consultations, \$110.50.

“Medical services 1/1/47 to and including 12/31/47. Examinations, treatments, medical reports submitted in this case. \$140.00.

“Medical services 1/1/49 to and including 4/12/48. Examinations, consultations \$50.00.

“Court testimony 4/12/48 \$100.00,” making a total of \$600.50.

Mr. Gearhart: I would like to have this marked as the next exhibit.

(Whereupon exhibit 8 was marked by Clerk.)

Cross Examination

By Mr. Collett.

Q. This exhibit 2 is an x-ray taken 3/6/46, as I understand it, Doctor, now I am referring to plaintiff's exhibit 2 the x-ray of the abdominal area taken March 6, these were taken for the purpose of stereoscopic examinations?

A. That is right.

Q. Now, these (indicating) are the same picture?
A. The same picture.

Q. Exhibit 2-A would you again point out the area which you testified concerning on direct examination involving the symphysis pubis?

(Testimony of Dr. John Robert Sullivan.)

A. For clarity I think we should have a better description of the pelvic structure so one will know where it occurs. The entire structure is known as the pelvic bony ring the sacrum is at the posterior of the spine and joins there bilaterally at a joint known as the sacro-iliac. This portion (indicating) is known as the ilium. The iliac cross this portion (indicating) comes forward and there is posteriorly the hip joint; there are two prongs here known as the inferior and superior rami [45] which again join in the bony structure of the pelvis, this is known as the symphysis pubis (indicating). Any separation in these joints revert to the posterior or the sacro-iliac or the entire function as the symphysis pubis is more or less protective of distortion in the pelvic bony circle. It frequently happens because of injury to the pelvis that either or both the rami are injured. This did not occur here. Whatever force was applied opened up this joint, and it is considered a fractured pelvis because there is a break in the bony continuity of the structure.

Q. The only area of involvement so far as the hip arrangement is concerned is the symphysis pubis as it is called.

A. The symphysis itself does not enter into the hip structure. The only disruption in the bony pelvis is the break.

Q. What is the nature of the tissue that covers that separation?

A. Densely thickened fibro-cartilage structure,

(Testimony of Dr. John Robert Sullivan.)

similar to the ones that hold your skull together.

Q. Where is this with reference to the buttocks, Doctor? A. It is the exact opposite.

Q. The buttocks is posterior and the symphysis pubis is anterior? A. That is correct.

Q. What involvement is this area subject to?

A. What phase of trauma can be delivered, you mean?

Q. I will withdraw that. What diseases or influences is that area subject to?

A. Well, years ago,—this is historical, before the advent [46] of improved obstetrics the presenting of the head or fetus, could not enter the true pelvis, necessitating the old time obstetrician's opening the abdominal wall with considerable manipulation of this area to permit the passing of the fetal head and was considered a problem. So far as disease is concerned that bony structure can be involved in any bone disease, that is, any disease that involves any other bony structure.

Q. Doctor, you mentioned obstetrics, in the process of childbirth is there any separation that occurs in that area?

A. There is a strain, not only on the symphysis pubis but on the sacro-iliac joint in the conformation and descent of the fetal head through the true pelvic outlet.

Q. Is that considerable of a strain on that area, that is, at the time of the delivery of the child?

A. No, for the simple reason that since the advent of caesarean practice the doctor does not

(Testimony of Dr. John Robert Sullivan.)

conjecture as to the size of the fetus compared to this bony portion——

Q. ——Doctor, let us ask you this, during the course of childbirth in the average female is that area not subject to a good deal of strain?

A. That is most difficult to answer because of conditions; the attempt today is to prevent any strain. The pelvis does not give. It can be stretched if forceps are placed within the vaginal tunnel and around the descending fetal head then by external leverage some strain is placed but the amount of strain necessary to produce that sort of thing is likely to produce death to the fetal head.

Q. This roughness here (indicating) was caused by the [47] accident of March 5, 1946, you say?

A. No, I said that the opening, the separation, and the indications of this picture taken on March 6, shows a disproportion in the symphysis over normal. One undoubtedly resulting from a vulsion type of fracture in that area.

Q. Define fracture in the sense you are using it?

A. Vulsion type is one wherein the ligmentous structure attaching two bones is disrupted by force. This type is somewhat irregular but we can refer to the shoulder point where the acromi-clavicular joint is disrupted by such type of fracture. We can also point to such type where the muscles are torn directly off the bone such as about the shoulder girdle and later bony spicules can be seen where they have been torn off the bone.

Q. Doctor, by vulsion type of fracture I am trying to understand you. It is not necessarily

(Testimony of Dr. John Robert Sullivan.)

a fracture of the bone. It may be a torn ligament.

A. There is vultion of the ligamentous structure carrying with it some of the critical substance of the bone?

Q. And this is that type?

A. I consider it. On the increase of the mobility of the symphysis on manipulation at that time she had some hemorrhage in the tissue.

Q. Doctor, at the time of the accident and the examination if it had been the condition there would be necessarily a reaction to your endeavor to establish mobility?

A. The point is that testing for fracture in and about the [48] pelvis, pressure is never applied to this area. Interpretation of any fracture involving the pelvic ring is done by transmission and if there is a break in the continuity the side so involved will cave.

Q. From what type of fracture would that come about?

A. Fracture in here and through here (indicating) or involving the entire ileo.

Q. You state that the hip would move? It would move on the application of force, which would be pressure?

A. This would not move to any extent; but movement of some distance, the pelvis is a solid structure. Where there is pressure applied and a break in the continuity of the bony ring there is a loss of resistance to the pressure applied indicating some break somewhere, a break in the stability of the bony pelvic ring. This was evi-

(Testimony of Dr. John Robert Sullivan.)

dent at this time. I cannot say whether that transmission or the transmission of shock resulted in this shifting each time. You see we test over the pelvis to determine whether there is any clinical evidence of fracture involving the pelvis.

Q. But, Doctor, in that picture what would you point out as to the conclusion you express?

A. The separation of 4 mm. and some drop of the right side of the superior border as compared with the left side here (indicating).

Q. Could this have been caused at any other time or by any other cause than this accident?

A. I do not feel that it could. The x-ray of her bony [49] structure interpreted by competent men in connection with the fall which I previously discussed was entirely negative of any disturbance in the pelvis. These were taken by Doctor Williams of this city.

Q. She suffered an injury to the buttocks?

A. That is correct.

Q. And your knowledge upon that is as to the external appearance and as to what the x-ray showed at that time?

A. Yes, that injury occurred previous to this injury of March 5, 1946; as I previously gave testimony, at that time the patient had a moderate contusion of her gluteal fold or buttocks and required treatment for 12 or 13 days for the bump on the buttocks. X-ray was taken and when interpreted was negative of any pelvic involvement, sacro-iliac or lower spine.

Q. Did you observe that x-ray in so far as

(Testimony of Dr. John Robert Sullivan.)

that area is concerned; that symphysis pubis?

A. Yes, there appeared to be no deformity of her symphysis pubis at that time.

Q. What other causes may accomplish similar pictures as we have here, Doctor, could horseback riding; would that show a similar picture as the one you have here?

A. No, I feel that would not be productive of separation unless there was trauma of more severity than could be caused by horseback riding. If the horseman was thrown it could possibly produce such a picture.

Q. Do you know what the cause of the buttocks injury was? [50]

A. Slipped on a step and hit the leader of the step with her buttocks?

A. To what extent was the injury?

A. Black and blue mark. She was under observation for two weeks. She had diathermy to the soft tissue.

Q. The elements that you state that indicate a fracture are in this area; the roughening of the edge?

A. Directly over the right side here (indicating) the interpretation placed on the x-ray, the right side here.

Q. Then as far as the picture is concerned it is the moderate increase or slight increase in width shown in this area?

A. Through here and particularly the depression or rather the disruption not in conformity with the normal circular contour. This demon-

(Testimony of Dr. John Robert Sullivan.)

strates in Doctor Capp's film taken in 1947 wherein he interpreted it as being a little wider than the first films. These films are in the record. This was considered a minimal degree of separation of the symphysis pubis on the occasion of this examination?

Q. Doctor, have you had many cases such as this?

A. Yes, I have had cases where this was badly disrupted, where this (indicating) was driven up into the bladder. In this case there was a minimum degree of disruption. You see this pelvis is designed to protect the structures within it. We are concerned mostly with what happened to the structure within the pelvic ring. When anything [51] happens to the pelvic ring we investigate as to the soft tissues damaged.

Q. Now, Doctor, plaintiff's exhibit 3-A which is an x-ray of the same area as plaintiff's exhibit 2-A.

A. Yes.

Q. That was taken I believe on September 27, 1947?

A. Yes.

Q. This particular x-ray we now have, the right-hand side to our left is that correct?

A. As we look at it now.

Q. Do you see any difference in the x-ray and plaintiff's exhibit 2-a. That is, do you see any difference in 3-a and 2-a?

A. It is difficult to interpret in this respect, of course one must rotate to appreciate this, that is to make this film constant with this film in the view box. It should be turned around.

(Testimony of Dr. John Robert Sullivan.)

Q. Very well, turn it around.

A. There has been a gradual replacement and thickening of the bone in this level of the symphysis. You will notice the persistence of the slight drop as to the level at the point of the superior margin of the symphysis, indicating that the right side of the pelvis is down. It is only a fraction of an inch but it is nevertheless present, that and the width there are the only means shown of explaining the persistent tenderness when one [52] presses over the symphysis pubis.

The Court: Does it show improvement?

A. There has been no further marked separation and it has not come together. The healing has occurred.

The Court: Would that healing increase as time goes on?

A. It may improve if the patient was an athletic individual of normal weight and in the proper age group, but this patient being moderately obese, her weight would tend to aggravate the separation. The official interpretation of these films is somewhere in this record. I think that the last measurement of it was 4 mm. separation in the symphysis at the time these films were taken. So far as the patient is concerned this healing has taken place. There is no bony union but a dense ligamentous structure.

The Court: Is there any improvement shown between the two pictures?

A. I feel there has been in this respect. Where the line here in the film of March 6, is a little fuzzy the line here is more solid. I would say

(Testimony of Dr. John Robert Sullivan.)

there has been a healing of the ligamentous structure that are attached there.

Q. This particular area is very strongly constructed in physiological composition of the body?

A. Yes, and it is a point of extreme stress. [53]

Q. If there was a tear in the tissue in that particular area wouldn't it show on the x-ray?

A. Density of tissue is not constant with the bone. It will deflect the x-ray to an extent, as does bone.

Q. You are going to show the separation in other pictures of this type?

A. It can be, that is correct.

Q. Were there any side views taken?

A. No. A stereoscopic inspection gives the expert the density that is necessary.

Q. In Doctor Capps' report it states as follows; and this is taken from plaintiff's exhibit 1, the report from the St. Mary's films, or the St. Mary's x-ray report:

"Films of the pelvis show very minimal separation of the pubis with a slight irregularity at the upper border of the right side of the symphysis. This may be simply a torn ligament to produce this appearance, for there is no separation at the sacro-iliac joints or any fracture of either hip joint or of the sacrum."

A. That is what I have been implying that is a torn ligamentous structure.

Q. If there had been a fracture wouldn't Doctor Capps have reported it?

A. He gave an adequate description as to the condition.

(Testimony of Dr. John Robert Sullivan.)

Q. I am trying, Doctor, to have you explain what you have termed a fracture? [54]

A. A separation of the pubis is a break in the continuity of the bony pelvis.

Q. A break in the continuity but is it a fracture?

A. To all intents and purposes, yes.

Q. To all intents and purposes.

A. There has been an interruption in the normal continuity of the bony structure by the separation of the two bones, a fracture of the continuity of the bony ring has occurred.

Q. The continuity of the bony ring is interrupted, you say, and there is a separation in the area, now, under any of these circumstances, Doctor, is it the ordinary thing for you to call a strained ligament a fracture?

A. I see what you are implying. If the strained ligament has to do with a ligamentous structure that holds together solid bone or what is considered a solid joint, one without motion it is considered a fracture. For example sutures in the skull are held together by similar structure; if a man receives a blow, or some force applied to the skull and it depresses a whole section of the bone, there may not have been a fracture of any bone, but the man is considered to have a fractured skull.

Q. You recommended and the plaintiff has worn, to some extent a truss or brace?

A. A pelvic support which produces constant pressure to stabilize this area of the pelvis. [55]

(Testimony of Dr. John Robert Sullivan.)

Q. What is ordinarily the history of this type of injury as far as healing is concerned?

A. Fractures of the symphysis, separation and tears frequently occur as supplement to other major fractures of the pelvis, fractures through the ilia with tortuous action tear this structure apart and produce an abnormal deformity. Lack of stability here and elsewhere would permit the hip motion to throw this segment of bone (indicating) up into the soft tissue of the pelvis. In fractures of this type when the thrust is made upward there is a tendency for this (indicating) to rise up in this motion because of the instability of this union.

The Court: Doctor, in such fractures as you have here what is the history as to recovery?

A. Statistically the wearing of a supportive type of garment, with a separation and minor fracture of this part of the symphysis makes it reasonably safe to permit ambulation within a period of four weeks. Such treatment as is required pending restoration of the normal structure is given if you can fix the pelvis, stabilize it through a garment; the weight is taken from here (indicating) with some discomfort.

Q. The patient Gladys Shaylor, when was she last examined by you for a determination of her present condition so far as this phase of the injury is concerned?

A. Interpretation made as to the history and effects of [56] the injuries in December. She has been examined this year also, not with addi-

(Testimony of Dr. John Robert Sullivan.)

tional x-ray but she has been examined. I feel that it is permanent in that respect.

Q. You state in your opinion this has permanently affected the plaintiff?

A. Yes, sir. One thing at this point: May I ask that Doctor Capps' report and interpretation of this film which is that of September I believe and I think we have it——

Mr. Collett: I think the question has been answered.

The Court: Yes, I think the Doctor has answered and no further explanation is necessary. We will recess at this time for fifteen minutes.

April 12, 1948, 3:15 p. m.

Q. Doctor, what is urachus?

A. Congenitally speaking it is one of the integral parts of the placenta and umbilical cord; in the fetal development it has to do with the entire congenital development and preserves itself during and after birth. It is a cord between the bladder and the navel, terminating at the umbilicus or navel.

Q. Have you observed any discharge at the navel in the plaintiff in this case?

A. Yes, sir, she did complain of discharge at the time of the injury but I attached no particular significance to [57] it feeling it was part of the muscle or fascia trauma of the inner abdominal wall.

Q. When did you first have knowledge of some difficulty in that area, that is, on this individual?

(Testimony of Dr. John Robert Sullivan.)

A. I don't recall the exact date but sometime after the patient left the hospital she complained of some discharge arising at her navel or umbilicus. I attributed it to a leakage from the urachus.

Q. Doctor, the gall bladder trouble for which you treated her. What were the symptoms observed by you at the time you treated her?

A. That was in 1943; the patient reported to the office with her mother. She complained of bowel discomfort and passage of acholic stools,—those are devoid of bile,—on examination of the abdomen,—the gall bladder lies in the right upper quadrant. That was distinct and quite tender and a diagnosis of mild cholecystitis was made. The patient was placed on a diet and given medication to bring about a normal function of the gall bladder.

Q. What were the difficulties of her menstrual period?

A. It wasn't right at that time but it was a short time after because of her evident upset plus the fact of considerable menstrual discomfort, she was brought to the office by her mother. I attributed the condition to an unbalanced thyroid gland and in turn the increase [58] in size of her ovaries resulting in pain and increasing at the termination of the menstrual flow. She was placed on thyroid management which resulted in diminution of the menstrual pain.

Q. Does she still complain of menstrual pain?

A. Not to the constant degree she did before. It is variable now.

(Testimony of Dr. John Robert Sullivan.)

Q. Does she complain of headaches? When did she last complain of headaches?

A. The patient said to me recently that the old headache which had been rather constant had gradually subsided and only occasionally does she have pain through the right parietal area of the scalp.

Q. When was the last complaint?

A. The latter part of last year so far as a severe headache is concerned. The most recent investigation was to the effect that she has had minor degree on occasions of headaches in relation to the trauma as I attribute it.

Q. In your examination of her,—Doctor, let me ask you, there are many kinds of headaches?

A. That is correct.

Q. A great many people complain of headaches?

A. That is correct.

Q. And it is a complaint probably where very few of us are confronted with any of these occurrences or any accidents?

A. That is correct. [59]

Q. Did she complain of headaches before the accident?

A. This girl had headaches at the time of the gall bladder and we termed it as a bilious headache, black spots before your eyes, that was controlled with the gall bladder control.

Q. Headache is subjective, is it not, Doctor?

A. That is correct. It is difficult to evaluate it. Evaluation is difficult unless there is a distinct

(Testimony of Dr. John Robert Sullivan.)

entity such as a blood clot or tumor or something.

Q. What is Meckles diverticulum?

A. Referring back to fetal life again that is a bowel connection through the uterine, the umbilical stock and the placenta; at birth immediately within the peritoneal cavity a portion of that stock drops off, in dropping off in most cases it is absorbed into the bowel structure but again occasionally it is not absorbed and it will give rise to the so-called left side appendicitis. It has all the structure of the normal bowel and can be of varying size from one inch to several inches in height.

Q. This operation on February 9 was for the removal of left-hand appendix?

A. The diagnosis of that condition was at the point of Meckles; there was no distinct Meckles entity of itself. It was a portion of the ilium distorted and above that the bowel was distended.

Q. What do you state was the cause of the obstruction? [60]

A. I cannot state. There were no adhesions at that point, no density at that point other than two lobes to the bowel producing obstruction, it might have been an old site of Meckles. I would not ascribe it to any entity other than to say it produced the obstruction and the patient later was relieved.

Q. Do you know whether or not the plaintiff had any hospital insurance?

A. Yes, she did.

Mr. Gearhart: I object to any evidence of any

(Testimony of Dr. John Robert Sullivan.)

insurance which the plaintiff may have had, it is incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Q. Doctor, have you been paid the amount you set forth in your bill, which is introduced as an exhibit? A. No, sir, I haven't.

Q. The amount you set forth for treatment at St. Mary's in the sum of \$200.00?

A. No, that amount is for treatment from March 5, to and including a date subsequent to the date of discharge, that was the sum of \$200.00.

Mr. Gearhart: May the answer of the Doctor as to insurance be stricken?

The Court: Yes, it may be stricken if he answered the question.

Q. March 5, 1946, to March 22, 1946, that charge is the sum of \$200.00?

A. That is correct. Also for the orthopedic work and other work necessary in connection with the pelvis, [61] right shoulder injury and right leg and right ankle injury.

Q. The treatment was directly in connection with the injuries?

A. Yes, sir, and I think it might be stressed, if I can just state in what connection and under what condition this first x-ray was taken, why I said she had an abnormal——

Mr. Collet: —I think the question has been fully answered and I ask that the entire answer so far given except "Yes, sir," be stricken.

The Court: It may be stricken.

Q. Medical management from March 23, 1946,

(Testimony of Dr. John Robert Sullivan.)

to and including December 31, 1946, you have set forth \$110.50? A. That is correct.

Q. That was examinations, physio-therapy and consultations? A. Yes, that is correct.

Q. How many times did you have the patient call on you, or how many times did you see the patient from March 22, 1946, to December 31, 1946?

A. I cannot say. I know she reported for physio-therapy treatments at intervals. Treatment is usually rendered three times a week depending on the type. Later in the year therapy was not as continuous as before. During the few months following her discharge from the hospital it was frequent, and it was then we had these consultations [62] with Doctor Spitalny; he saw this patient on account of her head injuries. That is simply in explanation of the charges made there.

Q. In the month of December how many times did she call at your office?

A. I haven't a daily record, I only have the time the patient was under treatment through that period of time to December 31, 1946.

Q. Were you treating her for thyroid difficulties during that period?

A. She has been continued on thyroid, the latter part of that has no connection with this, it has been billed to the California Physicians Service for services rendered.

Q. Between March 23 and December 31, 1946, how many times would you estimate that the plaintiff has consulted with you for examination or treatment?

A. May I ask, is that about this condition or about other conditions?

(Testimony of Dr. John Robert Sullivan.)

Q. For examination or treatment?

A. The patient has had routine check-ups including investigation of September, 1947, she has been examined for the purpose of reports which I have been requested to submit in this case. I would say for this specific matter I have seen the patient ten or twelve times.

Q. How many physio-therapy treatments in the month of [63] November of last year?

A. None whatever. In the terminal end of 1946 the physio-therapy was discontinued other than the wearing of the garment.

Q. During 1947 how many,—what per cent of the time that she consulted with you was with regard to other ailments that are not connected with this action?

A. A basal metabolism was taken in 1947 and reported to the California Physicians Service and the patient was advised as to medication in that regard. I saw her on two or three occasions for her sundry complaints in 1947 and advised her. I have seen the patient on many occasions.

Q. Is it necessary for the plaintiff to maintain a regular schedule with regard to the thyroid medication in order to avoid the congestion that you testified to?

A. She is classified as polyglandular; there is a deficiency in the thyroid secretion evidenced by the distribution of fatty layers and the distortion of her menstrual cycle and to a marked degree she has been helped by the thyroid medication; the increase in the size of the ovaries has

(Testimony of Dr. John Robert Sullivan.)

been decreased to normal and her menstrual cycle is also reduced to normal.

Q. As a result of the disposition of the congestion which you testified to the regulation of the intake of thyroid is not so strictly maintained—— [64]

A. No, we have established in her system an adequate thyroid reserve,—she takes thyroid yet. Under the law I must sign the prescription for those and I get them in amounts of a hundred tablets, which carries her through considerable time.

Q. And she takes the tablets herself?

A. That is correct. That is the ordinary use of thyroid medication.

Mr. Collett: No further questions.

* * * *

GLADYS SHAYLOR [67]

being recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination—(continued)

By Mr. Gearhart.

Q. You will recall the last question we asked you yesterday, what you did at that intersection and you stepped out on the cross-walk and couldn't remember after that?

A. That is correct, yes, sir.

Q. Where were you when you first became conscious?

A. I really didn't regain consciousness until the next day at the hospital. I came to but was kind of dazed at the Emergency hospital, that is all I remember of that.

(Testimony of Gladys Shaylor.)

Q. You became fully conscious in St. Mary's hospital the next day, at what time?

A. When I woke up in the morning.

Q. That is the first you really were conscious in the sense of knowing what was going on?

Mr. Collett: Objected to as leading.

Mr. Gearhart: I will withdraw the question.

The Court: Yes, I think she is perfectly able to answer questions without leading her.

Q. At St. Mary's hospital what treatment did you receive?

A. I was treated when I went in but I don't know what it was.

Q. After you became conscious? [68]

A. I received therapy treatments and had medicine to take.

Q. Can you describe the pain you suffered?

A. The pain I suffered was all over from head to toe.

Q. Did your head ache? A. Yes, sir.

Q. How long were you in St. Mary's hospital?

A. Sixteen days.

Q. From March 5, to March 22

A. Yes, sir.

Q. Were you able to walk out of St. Mary's hospital?

A. I was taken down on a wheel chair and helped into the machine.

Q. What did you do when you arrived at your home? A. I was confined to my bed.

Q. How many days?

(Testimony of Gladys Shaylor.)

A. Until the Doctor gave word to come and see him.

Q. Do you remember the time of that?

A. Well, about two weeks I was confined to bed before I went to see the doctor.

Q. Did the doctor prescribe or did you receive any special appliance to wear before you left the hospital?

A. I was fitted for a Kamp surgical belt. I was fitted for that before I left the hospital and when I got up I had to put that on; if I didn't I got a severe pain and had a severe pain until I did put it on.

Q. How long have you been wearing that, or how long did you wear it? [69]

A. Continuously since.

Q. Have you attempted to go without it, say, in the mornings?

A. Yes, I have gone a few mornings without it.

Q. Has that been lately?

A. Yes, recently on Saturday when I get up and am not going anywhere sometimes I don't put it on and then I start getting pain and have to go and put it on.

Q. When was the last time you tried that?

A. Last Saturday.

Q. Will you tell the Court whether you have any pain and suffering at this time?

A. Yes, sir. I do have pain down in the pelvis yet.

Q. Anywhere else? A. No other pains.

Q. Any headaches at the present time?

(Testimony of Gladys Shaylor.)

A. No, not like I used to have, just regular headaches at present, not like it was after the accident.

Q. Do you have any headaches at the present time?

Mr. Collett: I think she answered the question, I object to this as repetition.

The Court: I think it is better to let the witness testify, counsel knows that.

Q. Miss Shaylor, in your amended complaint it is alleged that Doctor Spitalny made a pelvic examination and the charge was \$25.00.

A. Yes, sir. [70]

Q. Did you go and see him?

A. Yes, sir, at the request of my doctor I went to Doctor Spitalny.

Q. I show you a bill on the billhead of Doctor Spitalny.

A. Yes, sir, that is the bill I paid to Doctor Spitalny.

Mr. Gearhart: I offer it in evidence.

The Court: It may be admitted.

Q. In your amended complaint you allege that your expenses, special damages you list Doctor Lusignan in there?

A. Yes, sir, that is for \$20.00. He is a specialist I was recommended to. Doctor Sullivan recommended him; after I came home from the hospital I went to him.

Q. You received a bill from him?

A. Yes, sir, I received a bill from Dr. Lusignan which I paid.

Q. You allege special damages as charge for ambulance \$7.00?

(Testimony of Gladys Shaylor.)

A. Yes, sir, from the Emergency to St. Mary's hospital.

Q. And an item of dress and suit cleaned?

A. Yes, sir, \$2.00 for dressed cleaned.

Q. For stockings torn?

A. Yes, sir, \$1.25 for stockings.

Q. And days off work \$187.38?

A. Yes, I was off work. I had so many days, I figured it amounted to \$187.38.

Q. And medicine to date \$20.00.

A. That is correct \$20.00 to date. [71]

Cross Examination

By Mr. Collett.

Q. By whom are you employed?

A. The Internal Revenue, 100 McAllister.

Q. That is an agency of the United States?

A. Yes, sir.

Q. How long have you been employed there?

A. It is three years now.

Q. As of today?

A. Yes, sir, three years, not to the exact date and month, but it is three years in 1948 that I have been employed by them.

Q. Now, after your injury on March 5, when did you return to work?

A. April 22, 1946.

Q. April 22?

A. Yes, sir, it was six weeks after the accident. I was out of work for six weeks.

Q. During that time did you receive your regular pay from the United States by virtue of your employment?

(Testimony of Gladys Shaylor.)

A. Yes, sir, I received the regular pay check.

Q. How much did you receive per week?

A. It was,—let's see, since then I have gotten a grade increase, it was sixty-four something.

Q. About sixty-four dollars?

A. At that time but now it is different. [72]

Q. You received your check every week?

A. Every two weeks, the second and fourth Wednesdays.

Q. But you received your check regularly?

A. Yes.

Q. You received it regularly for the period you were off work? A. Yes, sir.

Q. What was the leave grade?

A. What do you mean?

Q. You have regular leave?

A. Yes, we have sick leave and annual leave that we are entitled to, so many days a month. I had twenty-eight days sick leave coming. [73]

* * * *

Q. Do you have any accident insurance?

Mr. Gearhart: I object to that as incompetent irrelevant and immaterial. Any source of insurance is immaterial and incompetent here.

The Court: I think the same rule applies here that would apply against an individual case where the Government was not a party. I am of the opinion that insurance does not enter into this matter. I agree with counsel however, that there is good argument on both sides. I understand that some Courts have held it is proper and some Courts have

(Testimony of Gladys Shaylor.)

held it is not. I think at this time I will sustain the objection as to insurance. [80]

* * *

Q. The item that you have in your Exhibit number 7, or that you have in your complaint for medicine to date, is that for medicine as far as this particular cause is concerned or does that include ailments, any other ailments?

A. It is medicine that he prescribed for me. Doctor Sullivan mentioned medicine that I have been taking, that is what they are.

Q. You have been taking medicine for other ailments? A. Yes, sir.

Q. What medicine are you taking now pertaining to this injury of March 5, 1946?

A. Pills that Doctor Sullivan gave me.

Q. Are they thyroid pills?

A. Yes, thyroid pills.

Q. That is all the medicine you are taking is it?

A. Yes, sir.

Q. When did you last have a headache?

A. Just regular headaches off and on. I don't have them like I had when I got in the accident.

Q. What effort do you make as to the pain in the pelvic area to accomplish rehabilitation of that other than the truss, or for the relief of it?

A. I don't understand what he means.

Q. What are you doing by way of rehabilitation with regard to the pain you have in the pelvic area.

A. Just rest and taking it easy. [84]

Q. You have no exercise that you engage in?

A. Not especially.

(Testimony of Gladys Shaylor.)

Q. Where is the pain?

A. Right down here in front of the pelvis.

Q. In the abdominal area?

A. Now, it is lower than that, lower down.

Q. Is it always there? A. Yes, sir.

Q. Is it there now?

A. Yes, sir, slightly, not as bad as it was.

Q. What kind of pain is it?

A. A soreness there, if it is touched it is painful and sore.

Q. Is it more severe or less severe during menstrual periods?

A. Usually after menstrual period.

Q. After menstrual period you feel it?

A. Yes, sir.

Q. Then after menstrual period does it subside?

A. Yes, it does.

The Court: We will recess at this time for fifteen minutes.

11:10 a. m., April 13, 1948

Q. Doctor Sullivan testified that he treated you in June 1945 for an injury to the buttocks, will you tell the Court the circumstances of the injury?

A. I fell down stairs and got a soreness in the buttocks and Doctor Sullivan treated me for it.

Q. How did you fall down stairs?

A. Lost my footing.

Q. The injury was to the buttocks alone?

A. That's correct.

Q. Did you have any pain after the injury?

A. Not to my knowledge.

(Testimony of Gladys Shaylor.)

Q. Now, Doctor Sullivan testified that in March or prior to March 5, 1946 that he had instituted treatment with regard to your gall bladder, and enlargement of the ovaries and he put you on a thyroid treatment in which you took thyroid tablets. What was the symptoms that you experienced that led you to go to the Doctor?

A. Severe pains in my side. I had pains all of the time, that is what led me to Doctor Sullivan.

Q. As a result of those pains what happened?

A. Doctor Sullivan treated me. He gave me thyroid pills.

Q. Were those pains present at the time the appendix was removed? You recall the operation for the removal of the appendix?

A. Yes, that is in 1943.

Q. Which is prior to 1946? A. Yes, sir.

Q. The pain you experienced at that time was what? A. From the appendix you mean?

Q. Yes.

A. Severe pain on the right side. [86]

Q. After the removal of the appendix in 1943 you still had pain? A. Yes, sir.

Q. Where was it then?

A. On the left side.

Q. In regard to the menstrual period did you always experience a good deal of difficulty at that time? A. Yes, sir.

Q. With regard to pain? A. Yes, sir.

Q. Have you been troubled and have you experienced such pain ever since you reached puberty?

A. Yes, sir.

(Testimony of Gladys Shaylor.)

Q. That exists at this time?

A. It wasn't as bad in the beginning as what it is now. I still get pain once in a while.

Q. That occurs after your period?

A. Yes, sir, after. [87]

* * *

Redirect Examination

By Mr. Gearhart:

Q. In my examination with reference to special damages I overlooked asking you to tell about the hospital bill. Did you receive and pay the hospital bill for your treatment from March 2 to March 22?

A. The hospital bill I gave you.

Q. What was the amount of it?

A. \$211.85.

Q. That covered all the treatment at this hospital during the period? A. That's right.

Q. In regard to the sick leave which the Court asked about; this \$187.38, the item of twenty-eight days off work, let me ask you this question: Suppose you use all your sick leave and annual leave and become sick, would you lose any wages?

Mr. Collett: Objected to as argumentative, the facts are before the Court and it is a matter for the Court to determine. This is a payment by the United States Government and it covers sickness on behalf of its employees. There is nothing that this witness can testify to as to the application of that payment.

The Court: It would be entirely speculative however I think she may answer. [89]

(Testimony of Gladys Shaylor.)

A. We are entitled to so many days sick leave and so many annual leave. When the sick leave is used they go to the annual and when the annual leave is used then we go without any pay.

The Court: I understand your entire Doctor bill was \$250.50, for this period to December 31, 1947. That is the entire Doctor bill?

A. That is correct.

Q. Miss Shaylor, I show you plaintiff's exhibit 7 and I would like to have you examine that. Did Doctor Sullivan treat you at the various times specified in the bill? A. Yes, sir.

Q. In St. Mary's Hospital? A. Yes, sir.

Q. And afterward?

A. Yes sir, I didn't understand that question, I didn't know the Doctor's testimony was for that.

The Court: I was not referring to the Doctor's testimony but to your testimony, you testified that the Doctor's bill was \$250.50.

Q. Miss Shaylor, have you paid the Doctor any money? [90] A. Not to my knowledge.

Q. This represents an accurate statement as to the treatments, the times and places by Doctor Sullivan? A. Yes, sir.

Mr. Collett: I object to this as incompetent, irrelevant and immaterial this has been gone into and the witness has testified to all this. This document is hearsay as far as this witness is concerned.

The Court: You don't know anything about that bill, personally, do you? A. No, I don't.

WALTER A. SHAYLOR

Being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Gearhart:

Q. You are the Father of Gladys Shaylor?

A. Yes, sir.

Q. And you are one of the plaintiffs in this action? You are the Walter A. Shaylor who filed this as guardian ad litem? A. Yes, sir.

Q. Could you tell the age of the plaintiff?

A. Twenty-one years old now.

Q. Do you know her birth date?

A. July 31, 1926.

Q. In the amended complaint it is alleged that the plaintiffs were compelled to secure the services of physicians, roentgenologists, hospitals, ambulances and other appliances, and one of the items is a bill of St. Mary's hospital for [92] \$211.85?

A. That has been paid by me.

Q. That is a correct item?

A. So far as I know.

Q. With reference to the Doctor John R. Sullivan bill for \$600.50?

A. He has not been paid.

Q. I show you plaintiff's exhibit 7. Read that very carefully. Does that represent a statement of facts as to the treatment received by your daughter?

Mr. Collett: Objected to, it would be hearsay as to this witness, and it is incompetent, irrelevant and immaterial.

(Testimony of Walter A. Shaylor.)

The Court: Unless he knows and I don't see how he could know.

A. I can only answer that she received a lot of treatment and that I don't know what they were.

Q. He was the Doctor that treated your daughter? A. Yes, sir, Doctor Sullivan.

Q. The party named in that bill?

A. Yes, sir.

Q. And you know that he did treat your daughter?

Mr. Collett: I object to this line of examination——

The Court: I do think that we should allow the witness to testify and not have counsel testify. [93]

Q. Do you know whether the Doctor was at the Emergency hospital when your daughter was there?

The Court: There isn't any question about that.

Q. You allege in your complaint a bill of Doctor August Spitalny pelvic examination \$25.00. I show you exhibit 8 and ask you if you ever saw that before? A. I did.

Q. Has that been paid?

A. That has been paid.

Q. Who paid it? A. I did.

Q. You allege a bill of Doctor Frank W. Lusignan \$20.00? A. Yes, sir. That has been paid.

Q. You know that your daughter went to this Doctor? A. Yes, sir.

Q. Who paid that?

A. I think my wife paid that.

Q. Ambulance to St. Mary's hospital?

A. That bill was paid by my wife.

(Testimony of Walter A. Shaylor.)

Q. Medicine to date \$20.00.

A. We paid that, I can't recall the details.

Cross-Examination

By Mr. Collett:

Q. Mr. Shaylor, I understand that you paid the hospital bill? A. Yes, sir.

Q. You paid the \$25.00 to Doctor Spitalny?

A. Yes, sir.

Q. And the bill to Doctor Lusignan, your wife paid? A. Yes, sir.

Q. The ambulance bill, your wife paid?

A. Yes, sir.

Q. Did you pay for the cleaning of the dress and suit? A. I did.

Q. And the torn stockings? A. Yes, sir.

Q. And the medicine?

A. I don't recall the medicine.

Q. The medicine was bought over a period of time? A. Yes, it was.

Q. Did you pay for any of it? A. Yes, sir.

Q. What proportion? A. I don't recall.

Q. It was either paid by you or your wife?

A. Yes, that is right.

Q. And the bills of Doctor Sullivan, did you pay them? A. I haven't paid it.

Q. Has it been paid? A. No, sir.

Q. Do you still owe it?

A. So far as I recall I do.

Q. Did you pay anything on account?

A. No, I haven't.

Q. From March 5, 1946 to the present time?

(Testimony of Walter A. Shaylor.)

A. I paid for her bowel operation.

Q. With relation to the bill for the period of March 5, to December 31, 1946, \$110.50?

A. No, I haven't paid it.

Q. Are you going to pay it?

A. I guess I will have to pay it.

Q. You expect to pay that yourself? A. I do.

Q. Is that your obligation?

A. She is my daughter and I am going to pay the bill for her.

Q. Are you going to receive any contribution from any source?

Mr. Gearhart: I object to that if it refers to any insurance.

The Court: He may answer. [96]

Q. Is your daughter going to help you pay that?

A. Naturally.

Q. Why hasn't the money been paid during all this time?

A. It has just been neglected I guess.

Q. Have you received a bill?

A. Yes, sir, I have.

Q. When did you receive a bill?

A. I don't recall.

Q. Was it a month ago? A. I don't recall.

Q. Was it six months ago?

A. I don't recall.

Q. Did you just receive one bill?

A. I don't recall that either.

Q. As a matter of fact the bill has been paid?

A. No, sir, it has not.

Q. And is the same true for the period of Janu-

(Testimony of Walter A. Shaylor.)

ary 1, 1947 to December 31, 1947, \$140.00 is there anything paid on account of that bill?

A. I don't recall.

Q. Did you pay anything on account of it?

A. Not on account of the accident I haven't paid anything.

Q. You haven't paid anything?

A. No, sir.

Q. Did the bill of \$140, from January 1947 to December 31, 1947 include anything other than the accident? [97]

A. That, I don't know.

Q. Did you ever receive a Statement from Doctor Sullivan?

A. Yes, sir.

Q. Have you it with you?

A. No, sir.

Q. What did it state?

A. I don't recall.

Q. Does your attorney have the bill?

A. He may have the bill.

Q. Have you the bill?

Mr. Gearhart: In December there was an attempted compromise of this and at that——

The Court: —Counsel knows that is not proper, let's proceed with the evidence.

Q. Do you intend to pay the \$140.00?

A. I do.

Q. Are you going to receive any contribution from your daughter?

A. I expect to.

Q. How much are you going to pay?

A. I will have to pay it all.

Q. It is your obligation to pay it?

A. Yes, sir.

(Testimony of Walter A. Shaylor.)

Mr. Collett: That is all.

Mr. Gearhart: That's all. [98]

CATHERINE A. SHAYLOR

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Gearhart:

Q. Is your daughter Gladys Shaylor, the plaintiff in this action? A. Yes, she is.

Q. Can you tell the Court the date of her birth?

Mr. Collett: If there is anything that counsel has in mind that we can stipulate to we will save time here.

Mr. Gearhart: The date of her birth.

The Court: That is in evidence.

Q. Mrs. Shaylor, do you recall March 5, 1946?

A. Yes, sir.

Q. The date of the accident? A. Yes, sir.

Q. Tell the Court where you first saw your daughter after this accident?

A. At the emergency hospital.

Mr. Collett: The plaintiff has testified to this matter and the Doctor has testified to it, it seems to me that is in evidence.

The Court: There isn't any question but what she was taken to the emergency Hospital and received treatment.

Mr. Collett: No question at all about that.

The Court: Then you may examine as to other matters.

(Testimony of Catherine A. Shaylor.)

Q. After your daughter was removed from St. Mary's Hospital to your home were you with her?

A. Yes, sir.

Q. Do you recall how she was brought home?

A. In a wheel chair to the machine and from the machine to my home, my husband packed her up stairs.

Q. Was she confined to bed any of that time?

A. Yes, sir.

Q. Can you recall approximately how long?

A. One week and a half.

Q. Can you describe her condition so far as pain and suffering is concerned?

Mr. Collett: I object to this as hearsay.

The Court: She may answer just as to what she observed.

Q. State what you observed?

Mr. Collett: I think he should lay a foundation when she observed any condition, the time and place.

Q. After your daughter was brought home on March 22, 1946 tell the Court what you observed as to the condition of your daughter? [100]

Mr. Collett: That is too indefinite.

Mr. Gearhart: I had not finished the question.

Q. State what you observed as to the condition of your daughter as to pain and suffering.

A. She was nervous and melancholy.

Q. Did she have pains?

A. Yes, sir, she had terrible pain.

Mr. Collett: Objected to as hearsay.

(Testimony of Catherine A. Shaylor.)

The Court: She can tell only what she observed.

Q. You say she was melancholy?

A. Yes, sir.

Q. What do you observe up to the present time?

A. She is nervous.

Q. At the present time?

A. Yes, sir, still melancholy and nervous.

Q. Mrs. Shaylor, in the special damages here, there is an item of ambulance to St. Mary's Hospital did you pay that? A. I did.

Q. And injuries to clothes and stockings?

A. Yes, sir.

Q. Who paid that?

Mr. Collett: We are not questioning the payment of those items.

The Court: I guess I will just let you go ahead and same time, you just go ahead and put it in again.

Q. There is alleged an item of medicine \$20.00?

A. Yes, sir.

Q. Did you pay for that? A. Yes, sir.

* * * *

The Court: During the noon recess I have gone over some decisions of the Ninth Circuit Court of Appeals and I will permit you to recall, or to call any witness you wish as to the amount of insurance they have received. I will accept this testimony subject to objection.

Mr. Gearhart: Subject to the objection I have made.

The Court: Yes, and the Court will determine whether it is admissible later. [104]

* * * *

GLADYS SHAYLOR

Recalled for further cross-examination.

Cross-Examination

By Mr. Collett:

Q. Miss Shaylor, on March 5, 1946 what insurance did you hold at that time?

A. I belonged to the California Physicians Service. [108]

Q. What kind of service is that?

A. Hospital service in a group from the Internal Revenue. I pay Four dollars a month into it.

Q. What does that entitle you to by the way of benefits?

A. X-ray examination,—I have my card here may I refer to it?

Q. Yes, you may.

A. Well, it has medical and surgical care for ninety days you are entitled to home, office, and hospital visits, surgical operations, x-ray and radium treatments and x-ray examinations, laboratory tests, and specialists, consultants and anesthetics. You pay for the first two visits. If laboratory tests, or operations are necessary on the first two visits the fund pays for that. There is a waiting period of ten months for maternity care. Benefits are not available to dependants and all existing conditions are covered and you have your choice of Doctors. Hospital care and meals and service of a dietician; general nursing care; use of emergency room for accident cases and routine casts and splints; routine

(Testimony of Gladys Shaylor.)

dressings and medicine and choice of licensed hospitals.

Q. How much of the hospital bill was paid by the California Physician's Service?

A. I think \$152.00.

Q. How much of the bill rendered by Doctor Sullivan from March 5, 1946 to December 31, 1946 in the sum of \$110.50 [109] was paid by the California Physicians Service?

A. I really don't know, I don't remember.

Q. Was some of it paid?

A. Do you mean this \$110.00?

Q. The California Physicians Service pay part of the Doctors bills, will you look at that and tell us that again, or read that portion again?

A. You pay for the first two visits in each ailment. If laboratory tests, x-ray examinations or surgical operations are necessary during the first or second visit their cost will be paid for by the fund.

Q. Your visits after the first two visits are paid for?

A. They pay for them, yes.

Q. How much was paid after the first visit,—you had more than two visits?

A. Yes, I had more than two visits.

Q. Who paid for them?

A. The California Physicians Service I guess; I don't know, wasn't that in the medical report that was given.

Q. You don't know whether they were paid for or not. So far as you know there is no obligation so far as you are concerned?

(Testimony of Gladys Shaylor.)

A. I don't know.

Q. Now, how about the bill from January 1, 1947 to December [110] 31, 1947, of the sum of \$140.00.

A. I don't know what bills were paid. My Dad took care of all the bills, I don't know what bills were paid or not.

Q. Under this service you were entitled to the assistance of the California Physicians Service?

A. Yes, sir, they take care of the visits after the first two visits. I don't know how they pay or when they pay it.

Mr. Collett: I don't want to take up time with this Your Honor, but I know of no other way to bring it out. I don't think this matter should be obscured——

Mr. Gearhart: —As I said at the beginning of this trial if the Court finds for the plaintiff then I think the plaintiff would be entitled to the money she was out for hospitalization and Doctors bills.

The Court: That is true, but right now I don't see any way to determine that from the record, they were testified to at one time as some \$250.00. It seems to me that this exhibit showing the amounts does not amount to anything now. There is nothing to show that there is anything she is obligated for.

Mr. Gearhart: The Doctor testified as to that amount.

The Court: She has just testified that he rendered bills for \$140.00 and \$110.50. If this fund

(Testimony of Gladys Shaylor.)

paid this amount, or if it is paid by this group insurance, then, under the late decisions, I am under the [111] impression now that I am not going to put the Government in the position of paying the bills twice. It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this plaintiff destroys all the evidence now in regard to the bills.

* * * *

DR. CARRUTH WAGNER

Called by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Collett:

Q. You are in the Public Health service,—the United States Public Health Service?

A. Yes, sir.

Q. Any particular field or branch?

A. Orthopedic service, United States Marine Hospital.

Q. Are you regularly admitted to practice as a physician?

A. In the State of Nebraska and this State.

Q. Do you specialize? A. Yes, sir.

Q. What is your specialty?

A. Orthopedics.

Q. Your rank is Lieutenant Commander, Coast Guard?

A. With the United States Public Health Service, not in the Coast Guard per se.

Q. Were you similarly employed on the 12 of December 1947, Doctor? A. Yes, sir.

(Testimony of Dr. Carruth Wagner.)

Q. Doctor, were you requested to make a physical examination of the plaintiff in this case?

A. Yes, sir.

Q. Did you make such examination?

A. Yes, sir. [118]

Q. Did you take x-rays? A. Yes, sir.

Q. Did you bring with you the x-ray and reports? A. Yes, sir.

Q. These are the x-rays and report from the Marine Hospital that you brought with you this morning?

A. Yes,—if I may check the x-rays again to make sure they are of this case? Yes, they are.

Q. How long have you been practicing medicine?

A. In the service since 1941.

Q. When were you admitted to practice?

A. July 1941.

Q. How long have you been specializing?

A. Since 1946.

Q. State to the Court the examination made by you on or about December 12.

A. I think we made the examination December 6.

Q. December 6? A. Yes, sir.

Q. Who was present at the examination?

A. At the oral examination the patient and the attorney for the plaintiff here?

Q. Mr. Gearhart? A. Yes, sir.

Q. He was present during the entire examination? A. The oral examination. [119]

Q. Tell the Court the examination made by you, the findings made by you, and you may use the x-ray.

(Testimony of Dr. Carruth Wagner.)

A. Is that permissible?

The Court: Whatever your counsel wants.

A. Well, upon request of Admiral Scammell the patient appeared on the 6th of December at which time she said she was injured March 5, when struck by a Coast Guard truck at about five p. m. in San Francisco, at Van Ness and McAllister streets. She said she was rendered unconscious and taken to the Emergency Hospital and moved to the St. Mary's hospital and placed under the care of Doctor J. R. Sullivan. She remained there for 16 days. She regained consciousness late that night she stated, and remained in bed for 16 days in the hospital. Her complaint was severe headaches, no dizziness or visual difficulty. Since leaving the hospital she has recurrent headaches that come on in the morning and wear off during the day, and are relieved by anacin; no emotional instability or loss of ideational content. She complained of pain, which she attributed to the accident, pain in the pelvis or the region of the pelvis that comes on regularly the day following her menstrual period requiring her to go to bed. She said there was no urinary difficulty; her period and flow were unchanged after the accident as compared to prior to the accident. She also stated that her right hand and ankle were injured at the time of the accident but that she was recovered from that, and had no disability because of this accident. [120]

Q. Did she advise you that she had gall bladder trouble prior to the accident, and that she had an

(Testimony of Dr. Carruth Wagner.)

appendectomy in 1943 and was under treatment for a thyroid condition by Doctor Sullivan?

A. No, sir.

Q. Continue and state the result of your examination?

A. Well, the examination was essentially negative, except that she was obese, had dependent abdomen, she was more obese than would be normal for her age and height, that is about all the examination except the x-ray.

Q. What x-ray?

A. Of the skull, pelvis and spine.

Q. The external examination is what you have testified about now Doctor? A. Yes, sir.

Q. And the result of the external examination was what? A. Negative.

Q. Now, will you explain the findings as a result of the x-rays taken at that time.

A. The skull x-rays were entirely negative and show no abnormality whatever. This is a lateral of the skull, no fracture of either table; the basal region and attachment to the spinal column is normal. It is necessary to take two laterals to show fracture line if there is one. This is a posterior-anterior,—front to the back and shows [121] no abnormality in that. This is one with the head tipped back to show the basal region and shows no abnormality.

Q. I show you exhibits A to I,— A, B, C, D, E, F, G, H, I.—Strike that Mr, Reporter.

Mr. Collett: I offer those exhibits in evidence and ask that they be admitted.

(Testimony of Dr. Carruth Wagner.)

Mr. Gearhart: No objection.

The Court: They may be admitted.

Q. Now, Doctor, the x-rays you have in your hand, explain them?

A. This is a set of three, they are of the spine Anterior-Posterior view through the body showing the spine from approximately the 8th dorsal to the sacrum and shows no abnormalities; this is a lateral view showing a normal condition; the next is an oblique and shows no abnormalities. The last picture is of the pelvis; this is the right and left side showing the relationship of the wings to the sacrum and to the symphysis pubis and in my opinion shows no abnormality.

Q. Did you closely examine the region of the symphysis pubis?

A. Yes, sir, because she gave a history of possible injury to that region so we paid particular attention to that. On this x-ray there is no indication of old or recent fracture; the relationship between the two is within limits, there is some reactive perostitis?

Q. Will you explain reactive perostitis? [122]

A. These bones are covered by periosteum, it is a membrane that limits the growth of the bone. When something effects the periosteum a roughening occurs and new bone grows and she shows some haziness suggestive of some lesion at some time in her past life which has disturbed the periosteum. This is insignificant.

Q. What could cause this reaction?

(Testimony of Dr. Carruth Wagner.)

A. There are many things, trauma, some sort of trauma, trauma to the musculature which is attached to this bone, bone infection and certain metabolic diseases.

Q. Doctor, what do you class in the category of metabolic diseases?

A. Certain deficiencies, parathyroid disease, ovarian diseases will occasionally manifest in periosteum disease.

Q. As a result of your examination of the plaintiff and the examination of this x-ray picture,—your examination of December 6 and the examination of this x-ray what would you say is the condition of the plaintiff as disclosed with regard to the symphysis pubis?

Mr. Gearhart: We object to that as there is no foundation laid for the question?

The Court: He may answer.

A. From an overall picture, this patient at the time of this examination on the basis of the film and the physical examination showed two positive things, she shows evidence of some metabolic disturbance that causes these [123] upsets, it is not normal within limits for a girl of her age; second, that she had some disturbance within the pelvis that would give her this pain in menstruation that is not associated with the pelvis. It is unlikely that it would be orthopedic, but a condition that we can attribute to her uterus or ovaries or a relationship between the two.

Q. Did you receive an x-ray from the attorney

(Testimony of Dr. Carruth Wagner.)

for the plaintiff and a report made by Doctor Sullivan?

A. I think I did see them, but I don't recall them now. Did I make a report on them? Yes, I remember them, I see on my report that they were examined, we examined the x-ray films submitted by the attorney.

Q. Doctor, I show you plaintiff's exhibit 2B, an x-ray taken on the 6th of March 1946 and ask you if those were submitted to you at the time you just mentioned?

A. Yes, sir, I think so. I cannot state definitely because I haven't any record for identifying these films. Certain x-ray films were submitted by the attorney. I see no further identification.

Q. I will ask you at this time to look at Plaintiff's exhibit 2A and 2B?

A. I have two here showing the pelvis, one identified by the hospital number dated the 6th of March 1946 and the other is of the pelvis also identified as taken the same day of Miss Shaylor. [124]

Q. Calling your attention to the area of the symphysis pubis would you describe to the court your analysis of that?

A. I see no evidence of injury, she shows some disproportion because of the size of the ridge here (indicating) between the left and right and some irregularity that is present on the latter film, but no indication of fracture or separation of the symphysis pubis; no disproportion here (indicating). Since that disproportion takes place in fracture

(Testimony of Dr. Carruth Wagner.)

rather than separation on the symphysis I would not say these show any trauma to the bone?

A. Could there be a condition of traumatic injury in that area without exhibiting itself in the x-ray?

A. Yes, sir, injury to the soft tissue; very definitely. The x-ray only shows the condition of the bone itself. The bone is within normal limits. The relation of the two ridges are within normal limits for a woman of her age.

Q. Does it show a separation? A. No, sir.

Q. Would it be your opinion that whatever injury the plaintiff may have suffered on March 5, 1946, as a result of your examination that she is completely recovered?

A. I would say that she had recovered from any injury she received to her pelvis, skull or spine.

Q. The plaintiff has testified that she wears a Kamp, which as I understand, is to support the pelvic area. Are you familiar with such a device?

A. Yes, sir.

Q. What would be the effect of such device as far as her particular condition, as far as the area of the symphysis pubis is concerned?

A. I would like to qualify my answer by saying that I don't know why Doctor Sullivan prescribed it for her, what he had in mind nor what her complaints were that necessitated it. There are various types of Kamp garments; from her explanation I would assume that the garment was prescribed as an additional abdominal support. To take the weight

(Testimony of Dr. Carruth Wagner.)

off the spine. It is the kind we prescribe for a person with relaxed abdomen. It is to relieve the pain of the weight on the spine. As far as the pelvis is concerned I don't know that Kamp would help that. At each step the weight is transferred from one leg to the other leg and it is almost impossible to adequately support the pelvis during the weight shifting or throwing if there is any disconnection in the pelvis.

Q. If you knew a patient that had been operated for appendicitis, had an appendectomy; that had also had some disability and involvement of the gall bladder; some metabolic disability involving the thyroid; had subsequently been operated for Meckles diverticulum; who was obese [126] would you say that the necessity to wear such a truss was related to those conditions and the weakening of the abdominal wall as a result of those operations and the conditions involved?

A. Certainly it would have no value to the gall bladder; no support would be of any value there, or hyperthyroid or other metabolic disturbance. It would be of value if she had a backache, and second, if she developed a hernia it may be of benefit to support the area relaxed in operation, or a hernia; it is much to the benefit of the patient to have the hernia repaired. For the condition per se it would be of no value.

Mr. Collett: You may cross-examine.

* * * *

WALTER A. SHAYLOR

Recalled for further cross-examination, having heretofore been sworn, testifies as follows:

Cross-Examination

By Mr. Collett:

Q. Mr. Shaylor, you understand you are under oath? A. Yes.

Q. And supposed to tell the truth?

A. Yes.

Q. You have previously testified that you paid the hospital bill to St. Mary's Hospital of \$211.75, and it develops that you paid the difference between \$152.00 and \$211.75. Now, did you pay Doctor August Spitalny \$25.00? A. I did.

Q. Did you pay Doctor Frank W. Lusignan \$20.00?

A. No, but I was under the impression that it had been paid.

Q. Has the bill been paid?

A. I heard what was said in Court.

Q. Has the bill been paid?

A. I believe it has.

Q. By whom?

A. I don't know, I cannot answer that. [181]

Q. Did your daughter pay that?

A. I don't know.

Q. Did the California Physicians Service pay that? A. I heard you say that.

Q. The ambulance service to the hospital did you pay that? A. My wife paid that.

Q. And the medicine?

A. We paid for lots of medicine.

(Testimony of Walter A. Shaylor.)

Q. You set forth in amendments to paragraphs two, seven and nine of your complaint that you paid \$20.00 for medicine?

A. I paid so many medicine bills I don't recall what you are talking about.

Q. You have made the allegation in your complaint? A. Yes.

Q. Did you read it? A. Yes, sir.

Q. Did you know the contents of it?

A. I cannot recall it at this time.

Q. This was sworn to on the 3rd of April 1948, was it not? A. It must be, but I can't recall it.

Q. In the case of Doctor Lusignan, you didn't pay it but the bill was paid?

A. I was under the impression that it was paid.

Q. When did you get under that impression?

A. When I paid all of the bills. [182]

* * * *

The Court: I am satisfied in this case that this plaintiff has not lost anything financially through the loss of work. There is no evidence to show [184] that she needed her sick leave for any other purpose which caused her any loss. I am satisfied that there has been testimony submitted here that should not be considered by the Court. Some of the witnesses have been rather evasive. I think some of them knew some facts that they could have testified to if they had wanted to. I don't believe people are paying out over \$100.00 in amounts and then not knowing whether they paid it or not. I also do not think there is any permanent injury to this

plaintiff because of this accident. In the present day of medical science with the things they are doing and what they are able to accomplish in regard to accidents of this kind. I also think the pain and suffering was rather slight. The question of negligence is very close. Of course, when an accident of this kind occurs the presumption is that the plaintiff was obeying the law; it also seems in a great many of these cases the party loses consciousness even before they are hit. I think the testimony here was that she didn't remember anything after stepping down from the curb. However, I am going to hold that there is negligence and that the plaintiff is entitled to recover and further I will not allow her any money for the loss of time, she was paid during all of the time she was away from her work. I am going to allow her \$500.00 general damages and as to the question of special damages, that is difficult [185] for the Court under the testimony in this case. After going over the evidence and giving the plaintiff the benefit of some allowances where it is rather questionable, I will fix the special damages at \$460.25.

There is one matter bothering me some; I haven't taken into account nor considered the amount shown by the evidence at one place to be paid by the Insurance Company; perhaps I should determine that, but in the latter part of the case the Government felt that it was immaterial and made objection which was sustained so I didn't make any determination of that matter. I know of no way that it

could be provided in a judgment that a release be given by the Insurance Company, however, if the District Attorney has any idea on that it can be submitted at the time of the submission of findings and conclusions and judgment. The judgment of the Court is that she recover as I have stated, \$500.00 general damages and \$460.25 special damages. The Court will adjourn at this time until 10 in the morning.

State of Idaho,

County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court, District of Idaho; I further certify that I am the Court Reporter who reported in shorthand the testimony adduced and the proceedings had in and about the trial of the within entitled cause and that thereafter I prepared a transcript of the same.

I further certify that the foregoing transcript is a true and correct transcript of the testimony given and proceedings had in and about the said trial.

In witness whereof I have hereunto set my hand this 29th day of November 1948.

/s/ G. C. VAUGHAN.

[Endorsed]: Filed December 10, 1948.

[Endorsed]: No. 12152. United States Court of Appeals for the Ninth Circuit. Walter A. Shaylor, and Gladys Shaylor, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 13, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12152

WALTER A. SHAYLOR, et al

Plaintiffs and Appellants,
vs.

UNITED STATES OF AMERICA, a sovereign
Government,

Appellee.

STATEMENT OF POINTS ON APPEAL

The appellants hereby adopt as their points on appeal the statement of points appearing in the transcript of the record on appeal herein.

Dated: January 13, 1949.

MELVIN M. BELLI.

/s/ WILLIAM E. GEARHART,
Attorneys for Appellants.

Receipt of a copy of the within statement of points on appeal, on Jan. 13, 1949, is hereby admitted.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

[Endorsed]: Filed January 13, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

MINUTE ORDER FOR CONSIDERATION OF
APPELLANTS EXHIBITS

Upon the application of appellants and it appearing that the appellants' exhibits are principally x-rays and hospital records; and

Good cause appearing therefor:

It is hereby ordered that the original exhibits of appellants attached to the record on appeal herein, be considered by this Court without the necessity of their reproduction in the printed record designated by the appellants.

Dated: Jan. 17, 1949.

/s/ WILLIAM DENMAN,

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

United States Circuit Judges.

[Endorsed]: Filed Jan. 17, 1949. Paul P. O'Brien, Clerk.

No. 12,152

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER A. SHAYLOR and

GLADYS SHAYLOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

MELVIN M. BELLI,

WILLIAM E. GEARHART,

240 Stockton Street, San Francisco 8, California,

Attorneys for Appellants.

FILED

APR 8 - 1949

PAUL P. O'BRIEN, V

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Subject Index

	Page
Jurisdictional statement	2
Statement of the case	3
Specifications of errors	6
Argument	11
1. The trial court erred in admitting evidence of accident insurance or any other insurance in behalf of the injured person to mitigate damages	11
2. The decision of the trial court as to general damages is not supported by the evidence, is contrary to law.....	13
3. In assessing damages, the court must consider the continued and recently accelerated depreciation of the purchasing value of the dollar.....	15
4. A finding of the amount of damages by the court should be set aside where the amount recoverable was purely a matter of computation and where the computation is incorrect	15
5. A judgment for an amount awarded cannot be sustained where the judgment was wrong on any reasonable hypothesis	16
6. Where the findings of the trial court are based on undisputed evidence, any question as to the sufficiency of the evidence to sustain the findings is one of law and in consequence reviewable by the appellate court	16
7. If the findings are manifestly erroneous, the judgment should be reversed	17
8. Findings should be set aside where the trial court erroneously admitted evidence not material to the issue	17
9. Refusal to make findings as requested will be reviewed where the rejected findings are presented by the record on appeal	17
10. Appellate court may order a retrial on a limited issue or issues, if that issue can be separately tried without such confusion as would amount to a denial of a fair trial, viz.: as to damages	18
11. Conclusion	18

Table of Authorities Cited

Cases	Pages
Anheuser Busch, Inc. v. Starley, 28 Cal. (2d) 347, 170 P. (2d) 448	11, 12
Bennett v. Hobro, 72 Cal. 178, 13 P. 473.....	13
Brewer v. Second Baptist Church, 32 A. C. 808, 197 P. (2d) 713	18
Buswell v. San Francisco, 200 P. (2d) 115 (Cal. App. (2d))	15
Butler v. Allen, 167 Fed. (2d) 488, 490	15
Gackstetter v. Market St. R. Co., 10 C. A. (2d) 713, 52 P. (2d) 998	13, 14
Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494, 75 L. Ed. 1188	18
Kircher v. A. T. & S. F. R. Co., 32 Cal. (2d) 176, 195 P. (2d) 427	15
Knaust Bros. v. Goldschlag, 119 Fed. 1022	17
Koebig v. So. Pac. Co., 108 Cal. 235, 41 P. 469.....	13
Loper v. Morrison, 23 Cal. (2d) 600, 145 P. (2d) 1.....	13, 14
Old Colony Ins. Co. v. U. S. 168 Fed. (2d) 931, 933.....	11
So. Pac. Co. v. Zehnle, 163 Fed. (2d) 453.....	15
Standard Oil Co. v. U. S., 153 Fed. (2d) 958.....	11
Twenty-One Mining Co. v. Original Sixteen to One Mine, 265 Fed. 469, 471	18

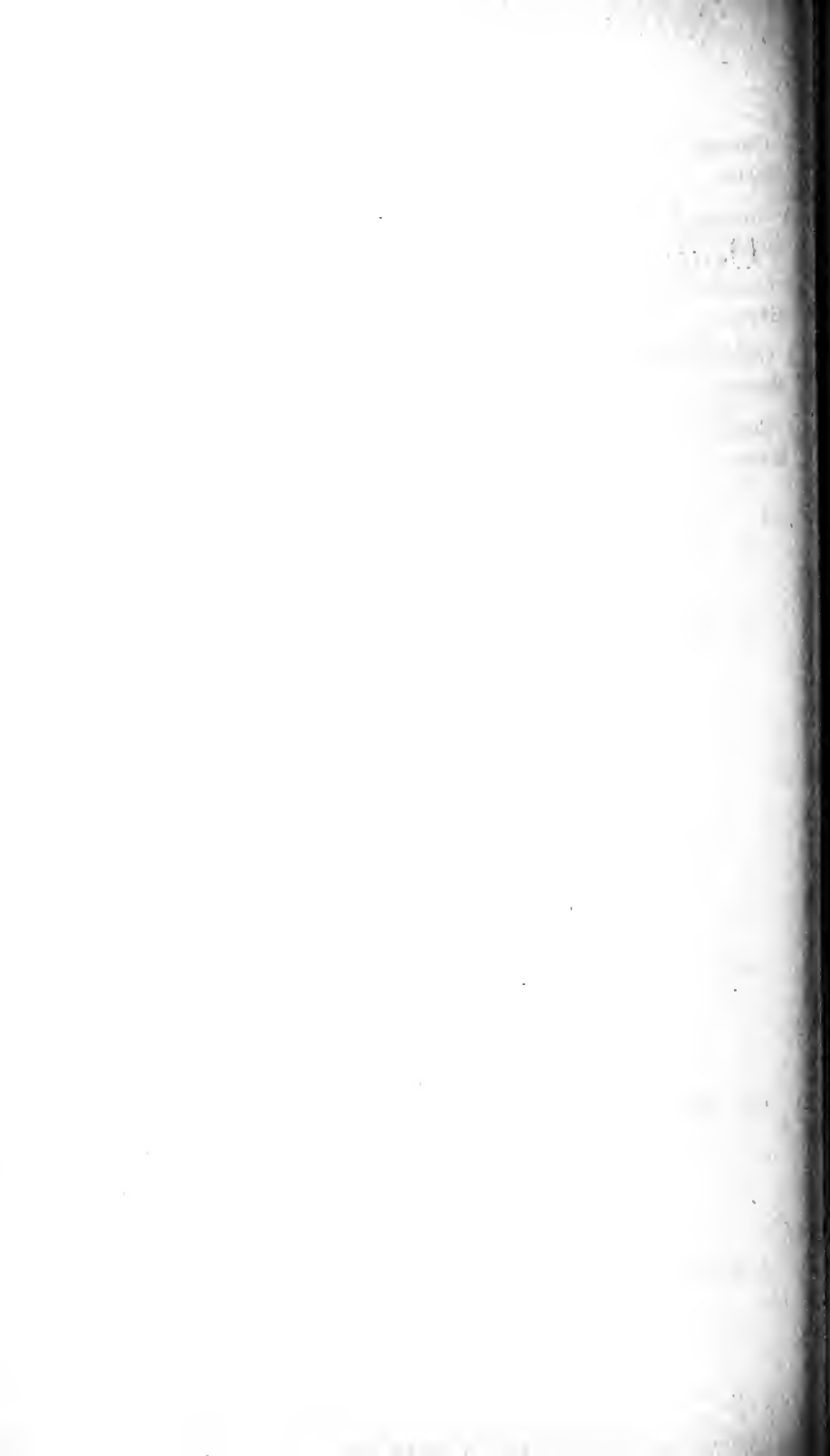
Statutes

Federal Tort Claims Act, 60 Stat. 843, USCA, Title 28, C. 20, Sections 921-946	2, 11
--	-------

Texts

20 Cal. Jur. 104, Title, New Trial, Sections 67, 68	13
4 Corpus Juris 548, Section 2347, n. 89, Title, Appeal and Error	17

	Pages
4 Corpus Juris 882, Section 2854, n. 19, Title, Appeal and Error	17
4 Corpus Juris 882, Section 2854, n. 23, Title, Appeal and Error	16, 17
4 Corpus Juris 882-3, Section 2854, n. 29, Title, Appeal and Error	17
4 Corpus Juris 888, Section 2858, n. 73, Title, Appeal and Error	15
4 Corpus Juris 889, Section 2858, n. 82, Title, Appeal and Error	16



No. 12,152

IN THE

United States Court of Appeals
For the Ninth Circuit

WALTER A. SHAYLOR and GLADYS SHAYLOR, vs. UNITED STATES OF AMERICA,	<i>Appellants,</i> <i>Appellee.</i>
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APPELLANTS' OPENING BRIEF.

The appellants were the plaintiffs in an action for damages for personal injuries against the appellee under the Federal Tort Claims Act. Following a trial by the Court, the Court rendered a judgment for the appellants against the appellee and awarded appellants \$500 as general damages and \$460.25 as special damages, by reason of the negligence of the appellee in the premises.

The appellants prosecute this appeal contending that a new trial should be granted appellants on the issues of damages only.

JURISDICTIONAL STATEMENT.

Following are the statutory provisions believed to sustain the jurisdiction:

1. Jurisdiction of the District Court.

U.S.C.A., Title 28, c. 20, Section 931, subdivision (a) provides that the District Courts shall have exclusive jurisdiction for any claim against the United States on account of personal injury in the district wherein the act complained of occurred.

2. Jurisdiction of this Court upon appeal.

U.S.C.A., Title 28, c. 20, Section 933(a) (1) provides that final judgments in the District Courts in cases under Federal Tort Claims Act shall be subject to review by appeal in the Circuit Courts of Appeals in the same manner and to the same extent as other judgments of the District Courts.

3. Pleadings necessary to jurisdiction.

Complaint. (R. 2.)

Answer. (R. 5.)

Judgment. (R. 13.)

Motion for new trial. (R. 14.)

Order denying new trial and amending judgment.
(R. 15.)

Notice of appeal. (R. 17.)

STATEMENT OF THE CASE.

On March 5, 1946, one of the appellants, Gladys Shaylor, hereinafter called Gladys, was injured, as a pedestrian, at the intersection of Van Ness Avenue and McAllister Street, San Francisco, California, by a truck owned and operated by the appellee; that at the time of said injury, Gladys was about 19 years of age and that she reached majority, or 21 years of age, at the time of the trial of said action on April 12, 1948.

During said trial, which continued for two and one-half days, the evidence offered and admitted on behalf of appellants was to the effect that appellant Gladys was collided with, at said time and place, by a U. S. Coast Guard truck, and rendered unconscious and remained unconscious for about twelve hours (R. 25-26, 61); that as a result of said collision, Gladys received the following personal injuries: cerebral concussion, contusions of the scalp, contusion of right shoulder, possible fracture of the pelvis, contusion of the bladder, multiple contusions and abrasions and strains of extremities (R. 26); that since said injury and at time of trial, two years later, Gladys was wearing a special surgical belt on prescription of her doctor, to relieve her from pain from said pelvic injury (R. 63); that it was the expressed opinion of her attending physician that the injury to her pelvis was permanent (R. 38-39); that although Gladys was only 21 years of age at time of trial, she was suffering pains and headaches

as a result of said injuries and in the opinion of the attending physician, such headaches would continue for an indefinite period (R. 39-40); that the special damages suffered by appellants were about \$1064.73, as follows: for Dr. John Robert Sullivan, attending physician, \$600.50 (R. 40-42); for hospital from March 2 to March 22, 1946, \$211.85 (R. 70); for Dr. August Spitalny, pelvic examination, \$25.00 (R. 73); for Dr. Frank W. Lusignan, \$20.00 (R. 73); for twenty-eight days off work, sick leave, \$187.38 (R. 70); for medicine to date, \$20.00 (R. 74).

On May 7, 1948, the trial Court made and entered its judgment in said action in favor of appellants and against appellee and by its findings of fact and conclusions of law, found that appellee was negligent at said time and place (R. 12), and that by reason thereof, appellants were entitled to have and recover a judgment against appellee in the sum of \$960.25, viz.: \$460.25 as and for special damages and \$500.00 as and for general damages. (R. 12-14.)

On May 17, 1948, appellants filed a motion for new trial on part of the issues in said action, viz.: as to the damages, general and special. (R. 14-15.)

On September 7, 1948, the trial Court made an order entered and filed September 9, 1948, denying said motion for new trial and amending said judgment as to general damages, only, by increasing the general damages from \$500.00 to \$1000.00, and awarding appellants a judgment in the sum of \$1460.25. (R. 15-16.)

On October 25, 1948, appellants filed a notice of appeal from said judgments entered and filed May 7, 1948, and entered and filed September 9, 1948, as to the amount of damages, general and special. (R. 17.)

The questions on appeal are whether or not the trial Court erred: (1) in its rulings as to admission of certain evidence; and (2) as to the findings of fact and conclusions of law as to damages, general and special, as follows, viz.:

1. that during the trial, over the objection of appellants, the trial Court permitted appellee to cross-examine Gladys, as to insurance and as to the amount of moneys received from such insurance on account of medical and hospital expenses arising out of said personal injuries (R. 66, 79-83);

2. that although the appellants offered evidence which was admitted to the effect that appellants suffered damages for medical and hospital expenses and loss of time by reason of said negligence of appellee, in the sum of about \$1064.73, the trial Court gave judgment that appellants may recover only \$460.25 as and for special damages (R. 12-14);

3. that although Gladys was rendered unconscious and remained unconscious for about twelve hours, by reason of the negligence of appellee, and suffered personal injuries, as follows: cerebral concussion, contusion of scalp, contusion of right shoulder, possible fracture of pelvis, or symphysis pubis, contusion of bladder, multiple contusions and abrasions and

strains of extremities and although Gladys was suffering pain and headaches at time of trial, two years later, the trial Court rendered judgment for appellants by reason of said negligence in the sum of only \$500.00 as and for general damages, after awarding appellants \$460.25, as special damages (R. 12);

4. that although appellants made a motion for new trial on the grounds of inadequacy of damages, both general and special, the trial Court denied said motion but amended the judgment as to general damages by increasing the general damages from \$500 to \$1000 and failed and refused to increase the special damages. (R. 15-16.)

SPECIFICATION OF ERRORS.

Assignment of Error No. 1.

The Court erred in permitting appellee to cross-examine Gladys, appellant, over objection, relative to any insurance which she received, independent of appellee; that said witness was asked: "Do you have any accident insurance?" whereupon appellants' attorney objected to that question on the ground that it was incompetent, irrelevant and immaterial—that any source of insurance is immaterial and incompetent (R. 66); that later, during the trial, the Court ruled that any witness may be called as to the amount of insurance payments they had received (R. 79); that thereupon counsel for appellee called Gladys and examined her as to accident insurance

carried and as to money received from that source (R. 80-83), and attempted to impeach the witnesses by reason thereof. (R. 80-83, 92-93.)

“The Court: She has testified that he rendered bills for \$140.00 and \$110.50. If this fund paid this amount or if it is paid by this group insurance, then under the late decisions, I am under the impression now that I am not going to put the Government in the position of paying the bills twice. It is the plaintiff’s duty to put in the case to establish these matters. *It seems to me that this plaintiff destroys all the evidence now in regard to the bills.*” (R. 82-83.) (Italics ours.)

Assignment of Error No. 2.

The Court erred in failing and refusing to sign and enter the findings of fact and conclusions of law as to special damages prepared and submitted by appellants (R. 9) and in making and entering its findings of fact and conclusions of law as to special damages (R. 11) for services of physicians, surgeons, roentgenologist, hospital and other medical attention, in the sum of \$460.25; that Dr. Sullivan, appellants’ physician testified, without contradiction, that his bill for services rendered was \$600.50 (R. 40-42); that appellants testified that their special damages were \$1064.73, as follows: for Dr. Sullivan, \$600.50 (R. 40-42); for hospital, \$211.85 (R. 70); for Dr. Spitalny, \$25.00 (R. 73); for Dr. Lusignan, \$20.00 (R. 73); for loss of 28 days of work, sick leave, \$187.38 (R. 70); for medicine to date, \$20.00. (R. 74).

Assignment of Error No. 3.

The Court erred in failing and refusing to sign and enter the findings of fact and conclusions of law as to general damages prepared and submitted by appellants (R. 9) and in making and entering its findings of fact and conclusions of law as to general damages (R. 11) in the sum of \$500.00 by reason of the premises; that the evidence before the Court shows that Gladys, appellant, was rendered unconscious and remained unconscious for about 12 hours (R. 25-26, 61); that by reason of the premises, Gladys, appellant, received the following personal injuries: cerebral concussion contusions of the scalp, contusion of the right shoulder, possible fracture of the pelvis, contusion of the bladder, multiple contusions and abrasions and strains of extremities (R. 26); that she still had pain and headaches, at the time of trial, two years later (R. 39-40); that she was wearing a special surgical belt, on doctor's prescription, to relieve her from pain from said pelvic injury, at time of trial. (R. 63.)

Assignment of Error No. 4.

The Court erred in failing and refusing to sign and enter the findings of fact and conclusions of law as to permanent injury prepared and submitted by appellants (R. 9) and in making and entering its findings of fact and conclusions of law as to permanent injury (R. 11); that Dr. Sullivan, attending physician, testified that the injury to her pelvis, symphysis pubis, was permanent. (R. 38-39.)

Assignment of Error No. 5.

The Court erred in failing and refusing to grant appellants' motion for new trial on part of the issues, viz.: as to damages, general and special, on the grounds: (1) insufficiency of the evidence to justify the decision and that the decision is against law; and (2) error in law occurring at the trial and excepted to by said appellants. (R. 14.)

Assignment of Error No. 6.

The Court erred in making the order dated September 7, 1948 and filed September 9, 1948 (R. 15), amending said judgment made and entered May 7, 1948, awarding appellants only \$460.25, as and for special damages (see assignment of error No. 2, for review of the facts in support of said assignment of error, which are incorporated herein, in support of this assignment of error No. 6).

Assignment of Error No. 7.

The Court erred in making the order dated September 7, 1948 and filed herein September 9, 1948 (R. 15), increasing the damages awarded appellants from \$500 to only \$1000, as and for general damages. (See assignment of error No. 3, for review of the facts in support of said assignment of error, which are incorporated herein, in support of this assignment of error No. 7.)

Assignment of Error No. 8.

The Court erred in making the order dated September 7, 1948 and filed herein September 9, 1948 (R. 15) in which it made a finding that there was no "intention at any time on the part of the Court to make any deduction in the amount allowed as damages by reason of any accident insurance, or other insurance carried by" the appellant (R. 15) (See assignment of error No. 1, for review of the facts in support of said assignment of error, which are incorporated herein, in support of this assignment of error No. 8).

Assignment of Error No. 9.

The Court erred in making the order dated September 7, 1948 and filed herein September 9, 1948 (R. 15) in which it made a finding that there was "no permanent injury to Gladys" one of the appellants. (R. 15.) (See assignment of error No. 4, for review of the facts in support of said assignment of error, which are incorporated herein, in support of this assignment of error No. 9.)

Assignment of Error No. 10.

The Court erred in the computation of the items of special damages in making its findings of fact and conclusions of law (R. 11) and in making its amended order dated September 7, 1948 and filed herein September 9, 1948. (R. 15.) (See assignments of errors Nos. 1 and 2, for review of the facts in support of said assignments of errors, which are incorporated herein, in support of this assignment of error No. 10.)

ARGUMENT.

1. THE DECISION OF THE TRIAL COURT AS TO THE SPECIAL DAMAGES IS CONTRARY TO LAW AND NOT SUSTAINED BY THE EVIDENCE. THE WRONGDOER IS NOT ENTITLED TO HAVE THE SPECIAL DAMAGES FOR WHICH HE IS LIABLE REDUCED BY PROVING THAT PLAINTIFF, THE INJURED PARTY, HAS RECEIVED COMPENSATION FOR THE LOSS FROM A COLLATERAL SOURCE, WHOLLY INDEPENDENT OF IT. UNDER THIS RULE, IT IS ERROR FOR THE TRIAL COURT TO ADMIT EVIDENCE OF ACCIDENT INSURANCE OR ANY OTHER INSURANCE IN BEHALF OF THE INJURED PERSON TO MITIGATE THE DAMAGES.

Standard Oil Co. v. U. S., 153 Fed. (2d) 958;
Old Colony Ins. Co. v. U. S., 168 Fed. (2d) 931,
 933;
Anheuser Busch, Inc. v. Starley, 28 Cal. (2d)
 347, 170 P. (2d) 448;
Federal Tort Claims Act, 60 Stat. 843, USCA,
 Title 28, C. 20, Sec. 931(a).

Subd. (a), Sec. 931, Federal Tort Claims Act, *supra*, provides in part as follows:

“* * * United District Court * * * shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States for money only * * * on account of damages * * * on account of personal injury * * * caused by the negligence * * * of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant for such damages, loss, injury * * * in accordance with the law of the place where the act or omission occurred.”

It is respectfully submitted that “in accordance with the law” of California, it is error for the trial Court to admit evidence of accident insurance or any other

insurance, in a damage suit for personal injuries, to mitigate the damages recoverable. See *Anheuser Busch, Inc. v. Starley*, supra.

At the time defendant attempted to prove that plaintiff Gladys Shaylor carried insurance to cover her loss for such an injury, the trial Court sustained plaintiff's objection to the admissibility of such evidence. (R. 66.) However, later in the trial of the case, the trial Court changed his ruling and allowed defendant, over plaintiff's objections, to put in evidence the amount of money plaintiff had received from insurance to reimburse her for expenses as a result of her injuries. (R. 80-83.) It is respectfully submitted that such conduct of the trial Court denied appellants a fair trial.

"The Court: She has just testified that he rendered bills for \$140.00 and \$110.50. If this fund paid this amount, or if it is paid by this group insurance, then, under the late decisions, I am under the impression now that I am not going to put the Government in the position of paying the bills twice. It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this plaintiff destroys all the evidence now in regard to the bills." (R. 82-83.)

In this connection, counsel for defendant attempted to impeach the plaintiffs as to the payment of such expenses, by cross-examination as to whether their testimony, admitted prior to such examination, to the effect that plaintiffs personally had paid such amounts, was true or false, if insurance company had paid the same. (R. 80-83, 90-92.) It is again respect-

fully submitted that such conduct on the part of appellee's counsel denied appellants a fair trial.

It is respectfully submitted that the rule or principle that what one does through his agent, or insurance company, he does himself, which need no citation of authorities, is a complete or satisfactory answer to such attempts at impeachment. However, the error was committed and is reflected in the award of damages.

2. **THE DECISION OF THE TRIAL COURT AS TO THE GENERAL DAMAGES IS NOT SUPPORTED BY THE EVIDENCE, IS CONTRARY TO LAW AND IS NOT SUSTAINED BY THE EVIDENCE IN THAT IT APPEARS FROM THE EVIDENCE THAT THE INJURIES TO THE PLAINTIFF WERE VERY SERIOUS AND THAT THE SUM AWARDED BY THE COURT WAS GROSSLY INADEQUATE—IN FACT SO INADEQUATE AS TO SHOCK THE HUMAN CONSCIENCE.**

Koebig v. Southern Pac. Co., 108 Cal. 235, 41 Pac. 469;

Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473;

Loper v. Morrison, 23 Cal. (2d) 600, 611, 145 P. (2d) 1, 6;

Gackstetter v. Market St. R. Co., 10 Cal. App. (2d) 713, 714, 52 P. (2d) 998;

20 *Cal. Jur.* 104, Title New Trial, Sections 67, 68.

Applying this rule to the facts, we find that one of the appellants, Gladys, was knocked unconscious by the negligent operation of a Coast Guard truck owned and operated by appellee and remained unconscious for 12 hours (R. 25-26); and as a direct result received

the following injuries: Cerebral concussion, contusions of the scalp, contusion of right shoulder, possible fracture of the pelvis, contusion of the bladder, multiple contusions and abrasions and strains of extremities (R. 26); that as a result thereof, at the time of the trial, 12 months after such injuries, Gladys was suffering from headaches (R. 39-40), nervousness and pain requiring special belt to be worn constantly to relieve the pelvic injury. (R. 63.)

In view of such injuries, it is submitted that an award of only \$500 as general damages is grossly inadequate and shocks the human conscience, especially where the trial Court found special damages of \$460.25.

In *Loper v. Morrison*, supra, the Court held that where there was testimony at time of trial injured party still was suffering from headaches, nervousness and pain, tended to prove future damages.

In *Gackstetter v. Market St. R. Co.*, supra, the Court said that the test to be applied in determining whether damages in personal injury action is proper is a comparison of the amount of the award with the evidence before the trial Court.

Following this rule, it is submitted that by comparing the evidence before the trial Court, the award was grossly inadequate.

The fact that on motion for new trial, the trial Court increased the general damages from \$500 to \$1000 is strong evidence that the trial Court admits it made an error, at the conclusion of the trial, as to the amount of general damages.

3. **IN ASSESSING DAMAGES, THE COURT MUST CONSIDER THE CONTINUED AND RECENTLY ACCELERATED DEPRECIATION OF THE PURCHASING VALUE OF THE DOLLAR.**

Southern Pacific Co. v. Zehnle, 163 F. (2d) 453;

Butler v. Allen, 167 F. (2d) 488, 490;

Kircher v. A. T. & S. F. R. Co., 32 Cal. (2d) 176, 195 P. (2d) 427;

Buswell v. City of San Francisco, 200 P. (2d) 115 (Cal. App. 2d).

In *Buswell v. City of San Francisco*, supra, it was held that a comparison of awards in different cases, is not conclusive in view of the change in value of the dollar and difficulty of finding comparable injuries.

-
4. **A FINDING OF THE AMOUNT OF DAMAGES BY THE COURT SHOULD BE SET ASIDE WHERE THE AMOUNT RECOVERABLE WAS PURELY A MATTER OF COMPUTATION AND WHERE THE COMPUTATION WAS INCORRECT.**

4 *Corpus Juris*, p. 888, n. 73, Section 2858, Title, Appeal and Error.

In this connection, plaintiffs testified as to the items of special damages (R. 40-42, 70-74) and there was no contradictory evidence. Therefore, it is respectfully submitted that the amount of special damages was purely a matter of computation.

Any attempts of counsel for defendant, after the Court allowed him to cross-examine the plaintiffs as to insurance, to impeach such direct evidence as to special damages, on the theory that plaintiffs did not pay such items personally, but through an insurance

company, was erroneous when we consider the principle of law that what a person does through an agent, he does himself. Again, we respectfully submit that such conduct of appellee's attorney denied appellants a fair trial. (R. 80-83; 90-92.)

5. **A JUDGMENT FOR AN AMOUNT AWARDED CANNOT BE SUSTAINED WHERE THE JUDGMENT WAS WRONG ON ANY REASONABLE HYPOTHESIS.**

4 *Corpus Juris* 889 n. 82, Sec. 2858, Title Appeal and Error.

It is respectfully submitted that the failure of the trial Court to properly compute the items of special damages was error and by reason thereof, the judgment was wrong on any and all reasonable hypothesis.

6. **WHERE THE FINDINGS OF THE TRIAL COURT ARE BASED ON UNDISPUTED EVIDENCE, ANY QUESTION AS TO THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDINGS IS ONE OF LAW AND IN CONSEQUENCE REVIEWABLE BY THE APPELLATE COURT.**

4 *Corpus Juris* 882, n. 19, Section 2854, Title Appeal and Error.

As stated above, the evidence as to the items of special damage was undisputed. There is not an iota of evidence in the record to contradict such items. It is again respectfully submitted that the misconduct of defense counsel in his cross-examination of appellants, as to insurance payments is no contradiction.

7. IF THE FINDINGS ARE MANIFESTLY ERRONEOUS, THE JUDGMENT SHOULD BE REVERSED.

4 *Corpus Juris* 882, n. 23, Section 2854, Title Appeal and Error.

8. FINDINGS SHOULD BE SET ASIDE WHERE THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE NOT MATERIAL TO THE ISSUE.

4 *Corpus Juris* 882-883, n. 29, Section 2854, Title Appeal and Error.

In this connection, appellants refer to and adopt the authorities and argument set forth under Points Nos. 2 and 4, pages 13, 14 and 15 of this brief.

9. REFUSAL TO MAKE FINDINGS AS REQUESTED WILL BE REVIEWED WHERE THE REJECTED FINDINGS ARE PRESENTED BY THE RECORD ON APPEAL.

4 *Corpus Juris* 548, n. 89, Section 2347, Title Appeal and Error;

Knaust Bros. v. Goldschlag, 119 F. (2d) 1022.

At the time of the preparation and signing of the findings of fact and conclusions of law, counsel prepared and presented to the trial Court proposed findings of fact and conclusions of law. (R. 9.)

10. APPELLATE COURT CAN ORDER A RETRIAL ON A LIMITED ISSUE OR ISSUES, IF THAT ISSUE OR ISSUES CAN BE SEPARATELY TRIED WITHOUT SUCH CONFUSION AS WOULD AMOUNT TO A DENIAL OF A FAIR TRIAL, VIZ.: ISSUE OF DAMAGES.

Twenty-One Mining Co. v. Original Sixteen to One Mine, 265 F. 469, 471;

Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 499, 75 L. Ed. 1188;

Brewer v. Second Baptist Church, 197 P. (2d) 713, 720 (Cal. Sup. Ct.).

It is respectfully submitted that the issues of special and general damages can be tried separately, without a trial on the issue of liability without such confusion as would amount to a denial of a fair trial; and that this rule is established by numerous authorities in both the federal and state Courts. (See *Twenty-One Mining Co.*, supra, 265 Fed. at page 471.)

11. CONCLUSION.

The errors herein presented, if allowed to stand uncorrected, will result in a grave miscarriage of justice, particularly the conduct of the trial Court in awarding only \$500 general damages for the injuries involved and in allowing in evidence the fact that appellants carried accident or other insurance and the misconduct of counsel for appellee in attempting to impeach appellants, or charging appellants with false testimony, after the admission of evidence as to part payment of the special damages by insurance car-

rier. Such errors are fundamental, prejudicial errors, which, we believe will lead this Court to grant a new trial on the issues of damages, general and special.

Dated, San Francisco, California,

April 4, 1949.

Respectfully submitted,

MELVIN M. BELLI,

WILLIAM E. GEARHART,

Attorneys for Appellants.



No. 12,152

IN THE
United States Court of Appeals
For the Ninth Circuit

WALTER A. SHAYLOR and
GLADYS SHAYLOR,

VS.

UNITED STATES OF AMERICA,

Appellants,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Introduction	1
Facts	2
Contentions	2
Argument	3
I. The decision of the trial court is supported by the evidence and cannot be disturbed where not plainly erroneous	3
II. The judgment as to special damages is adequate and is sustained by the evidence	7
Conclusion	12

Table of Authorities Cited

Cases	Page
Augustine v. Bowles (CCA-9th), 149 F.2d 93	4
Dewhurst v. Leopold, 194 Cal. 424	9
Faivret v. First Natl. Bank, 160 F.2d 827.....	4
Lerner Stores Corp. v. Lerner, 162 F.2d 160.....	4
McDonald v. Capital Co. (CCA-9th), 130 F.2d 311, cert. den. 317 U.S. 692.....	3
Neil v. Gross, 101 F.2d 153	3
Savage v. Loraine (CCA-9th), 148 F.2d 818, cert. den. 325 U.S. 885	4
United States v. Chicago R. I. & P. Ry. Co., 171 F.2d 377, 480	3
Wingate v. Bereut (CCA-9th), 146 F.2d 725.....	4
Texts	
8 Cal. Jur. 813	9
82 A.L.R. 1325	9

No. 12,152

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WALTER A. SHAYLOR and

GLADYS SHAYLOR,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

INTRODUCTION.

Appellants on page 1 of their brief state they are prosecuting this appeal "contending that a new trial should be granted appellants on the issues of damages only".

On page 5 they state the questions on appeal are whether or not the trial Court erred: (1) in its rulings as to admission of certain evidence; and (2) as to the findings of fact and conclusions of law as to damages general and special.

FACTS.

Gladys Shaylor by her guardian ad litem on February 18, 1947 filed a complaint against the United States of America under the Federal Torts Claims Act for damages for personal injuries received on the 5th day of March, 1946 allegedly as a direct and proximate result of the negligence of an employee of the United States of America acting within the scope of his authority in the operation of a Dodge truck, the property of the United States of America. Appellant claimed she was struck by the truck while crossing Van Ness Avenue at McAllister Street, in San Francisco, California.

The Court found there was negligence on the part of the Government employee and rendered a judgment for \$500.00 general damages and \$460.25 special damages. Appellant filed a motion for a new trial, which was denied. The Court, however, in denying the motion, increased the general damages to the sum of \$1000.00. The total amount of the judgment from which this appeal is taken is \$1460.25.

CONTENTIONS.

Appellants' appeal addresses itself to two principal points:

- (1) inadequacy of special damages
- (2) inadequacy of general damages

In the specification of errors, ten assignments of error have been made. Assignments of error 1, 2, 3,

5, 6, 8 and 10 relate to inadequacy of special damages, and assignments of error 3, 4, 5, 7 and 9 relate to inadequacy of general damages.

Appellee contends that the appeal in this case is wholly without merit and the judgment of the District Court should be affirmed.

ARGUMENT.

I.

THE DECISION OF THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE AND CANNOT BE DISTURBED WHERE NOT PLAINLY ERRONEOUS.

In *United States v. Chicago R. I. & P. Ry. Co.*, 171 F.2d 377, 380, Judge Bratton of the Tenth Circuit stated:

“In the trial of a nonjury case, it is the province of the trial court to observe the witnesses while testifying to judge their qualifications, to appraise their credibility, to determine the weight to be given their testimony, to draw reasonable inferences from the facts established, and to resolve conflicts in the evidence, both direct and circumstantial. It would not serve any useful purposes to detail the evidence adduced upon the trial of this case. It is enough to say that the evidence and the reasonable inferences fairly to be drawn from it were sufficient to support the findings, including the finding that the amount paid to Eitel was reasonable, and they were not plainly erroneous.”

Neil v. Gross, 101 F.2d 153;

McDonald v. Capital Co. (CCA-9th), 130 F.2d 311, cert. den. 317 U.S. 692;

Wingate v. Bercut (CCA-9th), 146 F.2d 725;
Augustine v. Bowles (CCA-9th), 149 F.2d 93;
Savage v. Loraine (CCA-9th), 148 F.2d 818,
 cert. den. 325 U.S. 885;
Lerner Stores Corp. v. Lerner, 162 F.2d 160;
Faivret v. First Nat. Bank, 160 F.2d 827.

The Court in its decision (Tr. 93-94) stated: "I do not think there is any permanent injury. I also think the pain and suffering was rather slight."

Appellant's doctor testified (Tr. pp. 34-35) that in August, 1943 appellant was operated and a chronic appendix removed. In October, 1943 appellant again reported to his office (Tr. 55) and complained of bowel discomfort and passage of acholic stools. A diagnosis of mild cholecystitis was made. A short time after because of evident upset and considerable menstrual discomfort she was again brought to the office by her mother. The condition was attributed to an unbalanced thyroid gland, and in turn the increase in size of her ovaries resulting in pain increasing at the termination of the menstrual flow. She was placed in thyroid management which resulted in diminution of the menstrual pain. She still complains of the menstrual pain not to the constant degree she did before (Tr. 55). It is variable now. She has been continued on thyroid.

On February 2, 1948 appellant again reported to the doctor's office (Tr. 36) and complained of acute abdominal pains, and a tentative diagnosis of Meckles diverticulum was made, and on February 9th she was operated and obstruction found in her small bowel.

On cross-examination the doctor (Tr. 57) defined Meckles diverticulum:

“Referring back to fetal life again; that is a bowel connection through the uterine, the umbilical stock and the placenta; at birth immediately within the peritoneal cavity a portion of that stock drops off, in dropping off in most cases it is absorbed into the bowel structure but again occasionally it is not absorbed and it will give rise to a so-called left side appendicitis. It has all the structure of the normal bowel and can be of varying size from one inch to several inches in height.”

With regard to the cause of the obstruction, the doctor (Tr. 57) said:

“I cannot state. There were no adhesions at that point, no density at that point other than two lobes to the bowel producing obstruction, it might have been an old site of Meckles. I would not ascribe it to any entity other than to say it produced the obstruction and the patient later was relieved.”

The doctor further testified (Tr. 60):

“She is classified as polyglandular; there is a deficiency in the thyroid secretion evidenced by the distribution of fatty layers and the distortion of her menstrual cycle and to a marked degree she has been helped by the thyroid medication.”

Dr. Carruth Wagner, an orthopedic specialist with the United States Public Health Service, made an examination in behalf of appellee and testified as a witness for appellee. He stated (Tr. 84) that appel-

lants' attorney, Mr. Gearhart, was present during the entire oral examination of appellant Gladys Shaylor and that she did not advise him that she had gall bladder trouble prior to the accident, that she had an appendectomy in 1943, and that she was under treatment for a thyroid condition. Dr. Wagner testified (Tr. 88):

“From an overall picture, this patient at the time of this examination on the basis of the film and the physical examination showed two positive things, she shows evidence of some metabolic disturbance that causes these upsets, it is not normal within limits for a girl of her age; second, that she had some disturbance within the pelvis that would give her this pain in menstruation that is not associated with the pelvis. It is unlikely that it would be orthopedic, but a condition that we can attribute to her uterus or ovaries or a relationship between the two.”

Dr. Wagner further testified (Tr. 89):

“I see no evidence of injury, she shows some disproportion, because of the size of the ridge here (indicating) between the left and right and some irregularity that is present on the latter film but no indication of fracture or separation of the symphysis pubis, no disproportion here (indicating). Since that disproportion takes place in fracture rather than separation on the symphysis I would not say these show any trauma to the bone.”

And again (Tr. 90):

“I would say that she had recovered from any injury she received to her pelvis, skull or spine.”

The testimony of Dr. Sullivan and Dr. Wagner adequately support the Court's findings that there was no permanent injury and that the pain and suffering were very slight and that the award of \$1000.00 was adequate.

The Court's attention is expressly called to the failure to reveal the past history of appellant Gladys Shaylor to Dr. Wagner at the time of his examination, also to the attempt to lead the lower Court to believe that the operation of February 9, 1948 was related to the accident of March 5, 1946.

II.

THE JUDGMENT AS TO SPECIAL DAMAGES IS ADEQUATE AND IS SUSTAINED BY THE EVIDENCE.

(1) Appellant states: "It is error for the trial court to admit evidence of accident insurance or any other insurance in behalf of the injured person to mitigate the damages."

This specification of error is founded upon a complete misconception of the purpose of the questions and the basis of the Court's ruling. But notwithstanding any question of subrogation that might possibly have entered the case, the matter became entirely irrelevant when the Court in its decision (Tr. 94) said:

"There is one matter bothering me some; I haven't taken into account nor considered the amount shown by the evidence at one place to be paid by the insurance company; perhaps I should

determine that. But in the latter part of the case the government felt that it was immaterial and made objection which was sustained so I didn't make any determination of that matter."

The Court further said:

"After going over the evidence and giving the plaintiff the benefit of some allowances where it is rather questionable, I will fix the special damages at \$460.25."

The Court further states (Tr. 93):

"I am satisfied in this case that this plaintiff has not lost anything financially through loss of work. There is no evidence to show that she needed her sick leave for any other purpose which caused her any loss. I am satisfied that there has been testimony submitted here that should not be considered by the court. Some of the witnesses have been rather evasive. I think some of them knew some facts that they could have testified to if they had wanted to. I don't believe people are paying out over \$100.00 in amounts and then not knowing whether they paid it or not."

The medical picture of this case is confused by the fact that appellant Gladys Shaylor is "polyglandular" and suffers "deficiency in the thyroid secretion" and "distortion of her menstrual cycle". Add to this her left and right appendix trouble, together with Meckles diverticulum, with the operations performed in 1943 and 1948, and a wilful failure to inform appellee's doctor of the previous history of appellant, all of which elements were in no wise related to the alleged

injuries of March 5, 1946, it becomes obvious that the lower Court was exceedingly generous in allowing \$460.25.

Appellants' amendment to Paragraphs II, VII and IX of Complaint (Tr. 7) sets forth the items of Special Damages.

(a) *Hospital St. Mary's \$211.85.* There is no evidence in the record to prove the reasonable value of the hospital services as related to the accident. Walter A. Shaylor testified (Tr. 92) he paid the difference between \$150.00 and \$211.75, although he previously stated he paid \$211.85 (Tr. 72).

The correct measure of damages for medical and hospital treatment, drugs, etc., incurred because of personal injuries is their reasonable value, rather than the amounts actually paid for them.

8 *Cal. Jur.* 813;

82 *A.L.R.* 1325.

Amounts paid on account of medical treatment and attention is some evidence of reasonable value thereof in the absence of showing to the contrary.

Dewhurst v. Leopold, 194 Cal. 424.

Dr. Sullivan testified (Tr. 59):

"She has been continued on thyroid, the latter part of that has no connection with this, it has been billed to the California Physicians Service for services rendered."

There is no showing whatsoever as to the reasonable value of the hospital services as related to this case.

(b) *Dr. John Robert Sullivan*, Medical Service \$600.50.

This sum was broken down (Tr. 41-42) to the following:

(1) 3/5/46 Emergency Hospital Examination, emergency treatment for shock. 3/5/46 St. Mary's Hospital care and attention 3/5/46 to and including 3/22/46 orthopedic management; fractured pelvis, right shoulder injury, right leg and right ankle injury, genito-urinary treatment and investigation, neuro surgical management hospital calls. \$200.00.

(2) Medical management 2/23/46 to and including 12/31/46. Examination, physiotherapy, consultation \$110.50.

(3) Medical Services 1/1/47 to and including 12/31/47. Examination, treatments, medical reports submitted in this case \$140.00.

(4) Medical Services 1/1/48 to and including 4/12/48 Examination, consultation \$50.00

(5) Court testimony \$100.00.

Appellant Gladys Shaylor testified (Tr. 71) in reply to a question by the Court:

"The Court: I understand your entire doctor bill was \$250.50 for this period to December 31, 1947. That is the entire doctor bill?"

A. That is correct."

It is evident from the testimony of Dr. Sullivan, Walter Shaylor and Gladys Shaylor that there is a

considerable overlap in charges made for treatment of the alleged injuries of the accident and treatments for the glandular deficiencies, gall bladder, menstrual and bowel trouble of Gladys Shaylor. Appellants obviously have endeavored to throw in everything possible whether related to the accident or not.

The lower Court (Tr. 83) made this observation: "It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this plaintiff destroys all the evidence now in regard to the bills."

(c) *Dr. John Robert Sullivan, surgical, Feb. 26, 1948, \$250.00.*

This charge was made for the operation in February, 1948. The record is clear that this operation was not related to the accident. Including the charge of \$250.00 as an item of expense in this case was highly improper.

(d) *Twenty-eight days off work, \$187.38.*

Appellant was employed by the United States of America in the Internal Revenue Department at the time of the accident. She testified (Tr. 66) that she received her regular pay check during the entire period she was off work. She used her sick leave to cover the time she was off work. There is no proof of loss of wages and appellant made no claim of such in her brief.

(e) *Medicine to date, \$20.00.*

Walter Shaylor (Tr. 92) was asked if he paid the \$20.00 for the medicine and he answered: "We paid

for lots of medicine.” “I paid so many medicine bills I don’t recall what you are talking about.” (Tr. 93.)

“Q. You have made the allegation in your complaint?

A. Yes.

Q. Did you read it?

A. Yes, sir.

Q. Did you know the contents of it?

A. I cannot recall it at this time.

Q. This was sworn to on the 3rd of April, 1948.

A. It must be but I don’t recall it.”

CONCLUSION.

It is submitted that there is no merit to the appeal in this case, that the evidence is adequate to support the judgment of the trial Court both as to special and general damages.

Dated, San Francisco, California,

May 25, 1949.

FRANK J. HENNESSY,

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C. ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12,152

IN THE
United States Court of Appeals
For the Ninth Circuit

WALTER A. SHAYLOR and
GLADYS SHAYLOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

MELVIN M. BELLI,

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Attorneys for Appellants.

FILED

JUN 13 1949

PAUL P. O'BRIEN,
CLERK



Subject Index

	Page
I. It is error to consider insurance on behalf of the injured plaintiff in an action under Federal Tort Claim Act in order to show award of damages adequate	1
II. The decision of the trial court as to general damages, first awarding only \$500 and on motion for new trial, raising it to \$1000, is not supported by the evidence and is contrary to law	9
III. It is well established law in California that where it clearly appears from the evidence that a judgment is wholly inadequate in amount, a refusal by the trial court to grant a new trial for that reason furnishes ample ground for a reversal of the judgment.....	10
In conclusion,—acts speak louder than words.....	11

Table of Authorities Cited

	Page
Dewhirst v. Leopold, 194 Cal. 424	6
G. L. Eastman Co. v. I. A. C., 186 Cal. 587.....	8
Price v. McComish, 22 C. A. (2d) 92.....	10
Shurman v. Fresno Ice Rink, 205 Pac. (2d) 77 (C. A. (2d))	8
Torr v. United Railroads, 187 Cal. 505	10

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Journal of Management Inquiry

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No. 12,152

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GLADYS SHAYLOR,

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VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

- I. IT IS ERROR TO CONSIDER INSURANCE ON BEHALF OF THE INJURED PLAINTIFF IN AN ACTION UNDER FEDERAL TORT CLAIM ACT IN ORDER TO SHOW AWARD OF DAMAGES ADEQUATE.

It is respectfully submitted that, just as before the trial court, the appellee is now seeking to bring this Appellate Court into the same error, viz: to consider the amount of insurance money paid by insurance carrier, in order to show that the judgment was adequate.

1. For example, on page eleven (11) of appellee's brief, in the first paragraph, appellee quotes partially from transcript, page 83, as follows:

"It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this

plaintiff destroys all the evidence now in regard to the bills.”

It is respectfully submitted that appellee completely misleads the court, when it thus partially quotes from the transcript, for by doing so, it fails to show why the court said what he said at that time.

Pages 82-83, Transcript, reads:

“Mr. Gearhart. As I said at the beginning of this trial if the court finds for the plaintiff then I think the plaintiff would be entitled to the money she was out for hospitalization and doctors bills.

The Court. That is true, but right now I don't see any way to determine that from the record, they were testified to at one time as some \$250.00. It seems to me that this exhibit (No. 7) showing the amount does not amount to any thing now. There is nothing to show that there is anything she is obligated for.

Mr. Gearhart. The doctor testified as to that amount.

The Court. She has just testified that he rendered bills for \$140.00 and \$110.50. If this fund paid this amount, or if it is paid by this group insurance, then, under the late decisions, I am under the impression now that I am not going to put the government in the position of paying the bills twice. *It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this plaintiff destroys all the evidence now in regard to the bills.*” (Italics ours.)

2. For a second example of attempting to mislead this Appellate Court, on page 9 of the appellee's brief, paragraph (a) appellee states the following:

Walter A. Shaylor testified (Tr. 92) he paid the difference between \$150.00 and \$211.75, although he previously stated he paid \$211.85. (Tr. 72.)

Here again it is respectfully submitted that appellee completely misleads this court when it partially quotes or summarizes the evidence contained in the transcript.

On said page 92 of the transcript we find the following (cross-examination of Walter Shaylor):

“Q. Did the California Physicians Service pay that?

A. I heard you say that.”

All this cross examination of Walter Shaylor, plaintiff, occurred after the trial court permitted the appellee to put in evidence the fact that the plaintiffs had received compensation, partially, from insurance which they carried.

It is respectfully submitted that appellee has not only completely failed to answer the first point, or argument, page 11 of appellants' opening brief, to the effect that the trial court erred in admitting evidence of any insurance in behalf of the injured person to mitigate damages, but that it is attempting, by quoting partially from the transcript, to lead this Honorable Court into the same error.

3. For a third example of misleading this Appellate Court, on page 7 of the appellee's brief, top line, it is stated that “the testimony of Dr. Sullivan” (who was plaintiff's family physician and expert witness), “support the Court's findings that there was no permanent injury and that the pain and suffering

were very slight and that the award of \$1000 was adequate."

As to permanent injury, Dr. Sullivan testified on direct (Tr. 38-39):

"Q. Considering your education, experience and the history of this case could you express an opinion as to whether there is a permanent injury to Gladys Shaylor with reference to her pelvis, her symphysis pubis?

A. From the separation which I have explained as shown in the films, this has given rise to some instability in the pelvic ring which accounts for the pain, on any jarring motion, through the lower extremities, any turn of the body will produce pain in the neighborhood of the symphysis pubis, in what should be a solid joint.

Q. Could you state that would be permanent?

A. Because of the lapse of time since the date of the injury and the improvement noted, I would say the condition today in relation to the pelvis is permanent, that is, as to the symphysis pubis."

On page 53 of the transcript, foot of page, the following occurred (cross-examination of Dr. Sullivan):

"Q. The patient Gladys Shaylor, when was she last examined by you for a determination of her present condition so far as this phase of the injury is concerned?

A. Interpretation made as to the history and effects of the injuries in December. She has been examined this year also, not with additional x-ray but she has been examined. I feel that it is permanent in that respect.

Q. You state in your opinion this has permanently affected the plaintiff?

A. Yes, sir."

As to pain and suffering, two years after injury, see page 63 Transcript (testimony of Gladys Shaylor):

"Q. Did the doctor prescribe or did you receive any special appliance to wear before you left the hospital?

A. I was fitted for a Kamp surgical belt. I was fitted for that before I left the hospital and when I got up I had to put that on; if I didn't, I got a severe pain and had a severe pain until I did put it on.

Q. How long have you been wearing that, or how long did you wear it?

A. Continuously since.

Q. Have you attempted to go without it, say, in the mornings?

A. Yes, I have gone a few mornings without it.

Q. Has that been lately?

A. Yes, recently on Saturday when I get up and am not going anywhere sometimes I don't put it on and then I start getting pain and have to go and put it on.

Q. When was the last time you tried that?

A. Last Saturday.

Q. Will you tell the Court whether you have any pain and suffering at this time?

A. Yes, sir, I do have pain down in the pelvis."

4. For a fourth example of misleading this Appellate Court, on page 9, foot of the page, the appellee's brief contains the bald statement as follows:

“There is no showing whatsoever as to the reasonable value of the hospital service as related to this case.”

On page 72 of the transcript, Walter A. Shaylor testified that the hospital bill of \$211.85, “has been paid by me.”

It is the law that amounts paid on account of medical treatment and attention is some evidence of reasonable value thereof; in the absence of showing to the contrary such evidence must be held to be sufficient.

Dewhirst v. Leopold, 194 Cal. 424.

In *Dewhirst v. Leopold*, supra, syllabus No. 8 reads:

“In such action, the amounts paid on account of medical treatment and attention is some evidence of reasonable value thereof, and there being no showing to the contrary, such evidence must be held to be sufficient.”

It is respectfully submitted that the testimony of Walter Shaylor is evidence of reasonable value in the absence of showing to contrary and that there is absolutely no showing to the contrary in the record, except evidence by way of payments by insurance company, brought out on cross examination.

5. As a fifth example of an attempt to mislead this Appellate Court, on pages 10 and 11 of appellee's brief is a statement “that there is a considerable overlap in charges made for treatment of the alleged injuries of the accident and treatments for the glandular deficiencies, gall bladder, menstrual and bowel trouble,” without any reference to any part of the

transcript, in connection with Dr. Sullivan's charge of \$600.50.

The best answer to this misleading and untrue statement is the contents of exhibit 7 for appellants which is quoted on page 10 of appellee's brief.

Furthermore, we find in the transcript on page 41, the following (testimony of Dr. Sullivan):

"Q. Doctor, did you prepare that? (referring to exhibit 7.)

A. This is prepared in my office by my secretary, it is for emergency treatment, treatment for shock at the emergency hospital, treatment at St. Mary's hospital, care and attention 3/5/46 to and including 3/22/46. Orthopedic management; fractured pelvis, right shoulder injury, right leg and right leg injury; genitor urinary treatment and investigation neuro-surgical management, and hospital calls. There are three items in 1946, 1947 and 1948 arising directly out of the injury sustained in addition to charges for certain medical transcripts requested of me in this case.

* * * * *

The Court. Is that the charge you made to her?

A. Yes sir, these charges. (indicating.)

The Court. That is what she owes you?

A. Yes sir, and as noted here, medical reports requested and testimony in Court.

The Court. Exhibit 7 may be admitted."

Furthermore, page 40 of the transcript (testimony of Dr. Sullivan):

"A. I think this is a reasonable charge and this is based on the Industrial Accident Commission fee schedule."

In this connection, it is the law that it is the accident or hazard acting upon the particular person, in her condition of health or body and not what the accident or hazard would be if acting on a normal or healthy person. In other words, whatever predisposing physical condition may exist in the particular person, if the accident or hazard is the immediate occasion of the injury, the injury arises out of the accident or hazard because it develops within it.

G. L. Eastman Co. v. I. A. C., 186 Cal. 587, 597.

In other words, all the matters quoted and discussed by appellee on pages four to six of their brief, as to her previous physical condition, is no argument against her receiving any or a reasonable compensation for *injuries sustained through the negligence of appellee*.

It was recently held in *Shurman v. Fresno Ice Rink*, 205 Pac. (2d) 77 (Cal. App. (2d)) that the trial court was justified in granting a new trial where the special damages were \$572.10 and there were serious injuries and the jury verdict was only \$800.00, and the Appellate Court of California held that a mere recitation of plaintiff's injuries suffered, when considered with the amount of special damages, clearly indicated that the trial court was justified in granting a new trial on the grounds that the amount allowed by the jury was inadequate.

II. THE DECISION OF THE TRIAL COURT AS TO GENERAL DAMAGES, FIRST AWARDING ONLY \$500 AND ON MOTION FOR NEW TRIAL, RAISING IT TO \$1000, IS NOT SUPPORTED BY THE EVIDENCE AND IS CONTRARY TO LAW.

It is further respectfully submitted that the appellee fails to answer the second point or argument, page 13 of appellants' opening brief, to the effect that the decision of the trial court as to general damages is not supported by the evidence and is contrary to law, except that on pages 4 to 6 of their brief, it attempts to justify the amount of the judgment because plaintiff Gladys Shaylor had previously had some gall bladder trouble, an appendectomy and had fallen on her buttock, all of which her family physician had testified to and had stated had no relation to this injury.

At foot of page 35, transcript, we find the following:

"Q. Doctor (Sullivan), in view of your education training and experience and the history of this case, could you express an opinion as to whether there is any relationship between the gall bladder trouble and the injury she sustained and suffered on March 5, 1946?

A. There has been no trauma to the area of the gall bladder. The gall bladder is not involved in this condition, as such.

Q. There is no logical relationship between this gall bladder trouble and the injury of March 5, 1946?

A. No."

Further, page 50, transcript, we find the following:

"The Court. Would that healing increase as time goes on?

A. It may improve if the patient was an athletic individual of normal weight and in the proper age group, but this patient being moderately obese, her weight would tend to aggravate the separation.”

III. IT IS WELL ESTABLISHED LAW IN CALIFORNIA THAT WHERE IT CLEARLY APPEARS FROM THE EVIDENCE THAT A JUDGMENT IS WHOLLY INADEQUATE IN AMOUNT, A REFUSAL BY THE TRIAL COURT TO GRANT A NEW TRIAL FOR THAT REASON FURNISHES AMPLE GROUND FOR A REVERSAL OF THE JUDGMENT.

Price v. McComish, 22 C. A. (2d) 92, 95;

Torr v. United Railroads, 187 Cal. 505.

In *Price v. McComish*, supra, it was held that a judgment in plaintiff's favor for \$200 was inadequate, where the uncontradicted evidence showed that the actual expenses of hospitalization, doctor's and nurse's services and necessary incidentals, for which plaintiff expended money, amounted to more than three times the amount of the judgment, without taking into account compensation that should have been awarded by reason of other damages that were occasioned to plaintiff.

Applying this rule, the uncontradicted evidence in the case at bar showed that the actual special damages, or expenses of plaintiffs for doctors, hospital, and incidentals, were more than twice the amount of the judgment as to special damages, and for this reason, alone, the refusal of the trial court to grant a new trial, furnishes ample ground for a reversal of the judgment as to damages.

IN CONCLUSION,—ACTS SPEAK LOUDER THAN WORDS.

Finally, there is uncontradicted evidence in the record that plaintiffs suffered the following special damages:

St. Mary's Hospital	\$ 211.85 (Tr. 70)
Dr. John Robert Sullivan . .	600.50 (Tr. 40)
Dr. August Spitalny	25.00 (Tr. 73)
Dr. Frank W. Lusignan . . .	20.00 (Tr. 73)
Medicine	20.00 (Tr. 74)
Sickleave, lost 28 days	187.38 (Tr. 70)

Total	<hr/> \$1064.73
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With this uncontradicted evidence, except for appellee's cross-examination as to payments by insurance carrier of plaintiffs, the trial court fixed the special damages at only \$460.25, and \$1000 general damages.

It is respectfully submitted that acts speak louder than words and that therefore it is impossible to find from the record how the Court arrived at such a small award of special damages, except that it considered insurance payments; that appellee has not shown from the record how the trial court arrived at the small award of special damages; and that therefore the small award of damages was and is "*plainly erroneous*".

Dated, San Francisco, California,
June 10, 1949.

Respectfully submitted,

MELVIN M. BELL,

WILLIAM E. GEARHART,

Attorneys for Appellants.



No. 12153

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES
LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and
through their Guardian ad Litem, JOSEPHINE SOUZA, JOSE-
PHINE SOUZA, individually, and MARY ADELE SOUZA and
GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD
SOUZA, Minors, by and through their Guardian ad Litem, H.
G. EASTMAN,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

APR 4 - 1949

PAUL P. O'BRIEN,
CLERK

United States
Court of Appeals

for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and through their Guardian ad Litem, JOSEPHINE SOUZA, JOSEPHINE SOUZA, individually, and MARY ADELE SOUZA and GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD SOUZA, Minors, by and through their Guardian ad Litem, H. G. EASTMAN,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answers:

Superior Court No. 356358	17
Superior Court No. 356359	23
Superior Court No. 356360	27

Appeal:

Bond on	68
Certificate of Clerk to Transcript of Record on	72
Designation of Record on (DC)	70
Notice of	67
Orders Extending Time to Docket	71
Statement of Points and Designation of Rec- ord on (USCA)	412

Bond on Appeal	68
Certificate of Clerk to Transcript of Record on Appeal	72

Complaints:

Superior Court No. 356358	2
Superior Court No. 356359	7
Superior Court No. 356360	12

ii.

	PAGE
Demand for Trial by Jury.....	47
Designation of Record on Appeal (DC).....	70
Designation of Record, Statement of Points and (USCA)	412
Judgment	57
Motion to Remand	49
Motion for Judgment and Motion for New Trial, Notice of	59
Names and Addresses of Attorneys.....	1
Notice of Appeal	67
Notice of Motion to Remand.....	48
Order Denying Motion to Remand.....	55
Orders Extending Time to Docket Appeal.....	71
Order Shortening Time	49
Order for Removal	46
Petition for Removal	35
Ruling on Motion for Directed Verdict and on Motion for New Trial	66
Statement of Points and Designation of Record on Appeal (USCA)	412
Stipulation and Order Consolidating Cases.....	33
Transcript of Testimony and Proceedings.....	73
Charge to the Jury	362

Witnesses for Defendant:

Aguer, Bernard George

—direct 228

—cross 240

Brady, Dudley T.

—direct 279

—cross 290

—redirect 307

Brown, Claire L.

—direct 320

—cross 324

Disbrow, Melvina

—direct 317

—cross 318

Mellolo, Frank

—direct 247

—cross 259

Krepps, Izetta N.

—direct 309

—cross 312

Stetson, E. T.

—direct 331

—cross 336

Talt, D. H.

—direct 272

Witnesses for Plaintiffs:

Davis, Oran

—direct	162
—cross	172
—redirect	189, 194
—recross	192

Hansen, Anthony A.

—direct	158
—cross	162

Souza, Geraldine

—direct	211
—cross	216
—redirect	217

Souza, John Martin

—direct	98
—cross	114
—recalled, cross	140
—redirect	155

Souza, Mrs. Josephine

—direct	218
—cross	221
—redirect	222
—recross	223
—recalled, redirect	224

Transcript of Motion for New Trial.....	404
---	-----

Verdict	56
---------------	----

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In the Superior Court for the State of California
in and for the City and County
of San Francisco

No. 28040-R

No. 356358

JOSEPHINE SOUZA, Individually, and as guardian ad litem for JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, and BENJAMIN SOUZA, minors, and MARY ADELE SOUZA,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, E. S. GLANVILLE, H. J. JOHNSON, and FIRST DOE,

Defendants.

COMPLAINT FOR DAMAGES

Come now plaintiffs above named, and for cause of action allege:

I.

That Josephine Souza was duly and regularly appointed guardian ad litem of John Martin Souza, Lucille Josephine Souza, James Lawrence Souza and Benjamin Souza, minors, for the purpose of prosecuting this action and ever since has been and now is the guardian ad litem of said minors.

II.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State

of Kentucky and doing business in the State of California, and other states; and that said defendant was at all times herein mentioned and now is engaged in the [1*] business of a common carrier by railroad in interstate commerce in said State of California, and other states, with its principal place of business in the City and County of San Francisco, State of California.

III.

That at all times herein mentioned, plaintiffs were, and now are, citizens and residents of the State of California.

IV.

That at all times herein mentioned, defendants E. S. Glanville and H. J. Johnson were citizens and residents of the State of California.

V.

That plaintiff does not know the true name of the defendant sued herein under the fictitious name of First Doe and that when the same is ascertained, plaintiff will pray leave of court to amend this complaint accordingly, together with the appropriate charging allegations.

VI.

That at all times herein mentioned, defendants E. S. Glanville, H. J. Johnson and First Doe, were agents, servants and employees of the defendant Southern Pacific Company, and at all times herein mentioned were acting in the course and scope of

* Page numbering appearing at foot of page of original certified Transcript of Record.

their employment and hiring by the Southern Pacific Company.

VII.

That at all times herein mentioned, Beckwith Road is a public street and highway in the County of Stanislaus, State of California, running in a general easterly and westerly direction; that the said Beckwith Road intersects the tracks of the defendant railroad company at approximately right angles, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99. [2]

VIII.

That plaintiff Josephine Souza is the surviving wife of Antonio Azevedo Souza, deceased, and plaintiffs John Martin Souza, Lucille Josephine Souza, James Lawrence Souza and Benjamin Souza, minors, and Mary Adele Souza are the surviving children of plaintiff Josephine Souza, and Antonio Azevedo Souza, deceased, and that said plaintiffs are the sole heirs at law of said decedent.

IX.

That on or about the 11th day of October, 1945, at or about the hour of 9:00 a.m. thereof, the decedent, Antonio Azevedo Souza, was a guest passenger in a certain 1941 Ford Coupe automobile, bearing license No. 93H838, owned and operated by John Martin Souza in a general easterly direction on Beckwith Road, at the intersection thereof with the defendant Southern Pacific Company's railroad tracks.

X.

That at said time and place, defendants E. S. Glanville, H. J. Johnson, and First Doe, while acting within the course and scope of their employment and hiring by the defendant, Southern Pacific Company, were running and operating a certain Southern Pacific Engine No. 2478, Train No. 2-59, the property of the defendant Southern Pacific Company, in a general northerly direction on defendant's railroad tracks, at the intersection thereof with Beckwith Road, as aforesaid.

XI.

That at said time and place, said defendants, and each of them, so carelessly and negligently operated and propelled defendant's locomotive as aforesaid, as to cause said engine to collide with the automobile in which the decedent, Antonio Azevedo Souza, was riding as a guest passenger as aforesaid, thereby inflicting injuries upon him which immediately resulted [3] in his death.

XII.

That at the time of the happening of the aforesaid accident, Antonio Azevedo Souza was a well and able-bodied man of the age of fifty-seven (57) years, capable of earning and earning the sum of Two Hundred Dollars (\$200.00) per month; that all of said sum said decedent contributed to the plaintiffs as and for their maintenance and support.

XIII.

That by reason of the death of said Antonio Azevedo Souza, plaintiffs have been further deprived of his care, comfort and society.

XIV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, and the death of said Antonio Azevedo Souza proximately caused thereby, plaintiffs were compelled to and did incur an indebtedness in the sum of One Thousand One Hundred Fifty-seven and 38/100 Dollars (\$1,157.38), as and for funeral expenses, all to plaintiffs' damage in said amount.

XV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, and the death of said Antonio Azevedo Souza proximately caused thereby, plaintiffs have been generally damaged in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiffs pray judgment against defendants and each of them in the sum of One Hundred Fifty-one Thousand One Hundred Fifty-seven and 38/100 Dollars (\$151,157.38), together with their costs of suit incurred herein.

CLIFTON HILDEBRAND,
JAMES A. MYERS,

Attorneys for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed Aug. 12, 1946. [4]

[Title of Superior Court and Cause.]

COMPLAINT FOR DAMAGES

Comes now plaintiff above named, by and through his guardian ad litem, Josephine Souza, and for cause of action alleges:

I.

That Josephine Souza was duly and regularly appointed guardian ad litem of John Martin Souza, a minor, for the purpose of prosecuting this action and ever since has been and now is the guardian ad litem of said minor.

II.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California, and other states; and that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce [6] in said State of California, and other states, with its principal place of business in the City and County of San Francisco, State of California.

III.

That at all times herein mentioned, plaintiff was, and now is, a citizen and resident of the State of California.

IV.

That at all times herein mentioned, defendants E. S. Glanville and H. J. Johnson were citizens and residents of the State of California.

V.

That plaintiff does not know the true name of the defendant sued herein under the fictitious name of First Doe and that when the same is ascertained, plaintiff will pray leave of court to amend this complaint accordingly, together with the appropriate charging allegations.

VI.

That at all times herein mentioned, defendants E. S. Glanville, H. J. Johnson and First Doe, were agents, servants and employees of the defendant Southern Pacific Company, and at all times herein mentioned were acting in the course and scope of their employment and hiring by the Southern Pacific Company.

VII.

That at all times herein mentioned, Beckwith Road is a public street and highway in the County of Stanislaus, State of California, running in a general easterly and westerly direction; that the said Beckwith Road intersects the tracks of the defendant railroad company at approximately right angles, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99. [7]

VIII.

That on or about the 11th day of October, 1945, at or about the hour of 9:00 o'clock a.m. thereof, plaintiff owned and operated a certain 1941 Ford Coupe automobile, bearing license No. 93H838 in a general easterly direction on Beckwith Road, at the intersection thereof with the defendant Southern Pacific Company's railroad tracks.

IX.

That at said time and place the defendants E. S. Glanville, H. J. Johnson, and First Doe, while acting within the course and scope of their employment and hiring by the defendant, Southern Pacific Company, were running and operating a certain Southern Pacific Engine No. 2478, Train No. 2-59, the property of the defendant Southern Pacific Company, in a general northerly direction on defendant's railroad tracks, at the intersection thereof with Beckwith Road, as aforesaid.

X.

That at said time and place, said defendants, and each of them, so carelessly and negligently operated and propelled defendant's locomotive as aforesaid, as to cause said engine to collide with the automobile owned and operated by plaintiff, John Martin Souza, as aforesaid, and that as a direct and proximate result of such carelessness and negligence, plaintiff sustained the injuries hereinafter enumerated.

XI.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to-wit: Concussion of the brain, numerous contusions and abrasions about the body, hand lacerations, extreme [8] pain and suffering and a severe shock to his nervous system, which injuries are, and will be, permanent.

XII.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, plaintiff was forced to and did incur expenses for medical treatment, the exact amount and extent of which plaintiff does not now know; that plaintiff is informed and believes and therefore alleges that he will require further medical attention as a result of said injuries and will therefore incur a further indebtedness in an amount as yet unascertainable, and that when said amounts are ascertained, plaintiff will pray leave of court to insert said sums as the reasonable value of said medical treatment.

XIII.

That at the time of the happening of the accident as aforesaid, plaintiff was a strong and able-bodied man capable of earning and earning the sum of approximately Two Hundred Dollars (\$200.00) per month; that as a direct and proximate result of the carelessness and negligence of defendants and each of them and the injuries proximately caused plaintiff thereby, plaintiff was rendered incapable of performing his usual work or services or any work or services whatsoever, and will be unable to perform his usual work or services or any work or services whatsoever for an indefinite period of time in the future, all to plaintiff's damage in an amount as yet unascertainable and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

XIV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them, plaintiff has been [9] generally damaged in the sum of Fifteen Thousand Dollars (\$15,000.00).

Wherefore, etc.—

As and for a second, further, separate and distinct cause of action against defendants and each of them plaintiff alleges as follows:

I.

Plaintiff refers to Paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

That at said time and place, said defendants, and each of them, so carelessly and negligently operated and propelled defendant's locomotive as aforesaid, as to cause said engine to collide with the automobile owned and operated by plaintiff, John Martin Souza, as aforesaid.

III.

That by reason of the carelessness and negligence of defendants and each of them as aforesaid and as a direct and proximate result thereof, said plaintiff's automobile was damaged; that immediately before the happening of the accident said

plaintiff's said automobile was of the reasonable value of Eight Hundred Fifty Dollars (\$850.00); that immediately after the happening of the accident said plaintiff's said automobile was of the reasonable value of Two Hundred Dollars (\$200.00), all to plaintiff's damage in the sum of Six Hundred Fifty Dollars (\$650.00).

Wherefore, plaintiff prays judgment against defendants and each of them in the sum of Fifteen Thousand Six Hundred [10] Fifty Dollars (\$15,650.00), together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

JAMES A. MYERS,
CLIFTON HILDEBRAND,
Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Aug. 12, 1946. [11]

[Title of Superior Court and Cause.]

COMPLAINT FOR DAMAGES

Come now plaintiffs above named, by and through their guardian ad litem, H. G. Eastman, and for cause of action allege:

I.

That H. G. Eastman was duly and regularly appointed guardian ad litem of Geraldine Souza, Lawrence Souza and Richard Souza, minors, for the purpose of prosecuting this action and ever since has been and now is the guardian ad litem of said minors.

II.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California, and other states; and that said defendant was at all times herein mentioned and now is engaged in the [13] business of a common carrier by railroad in interstate commerce in said State of California, and other states, with its principal place of business in the City and County of San Francisco, State of California.

III.

That at all times herein mentioned, plaintiffs were, and now are, citizens and residents of the State of California.

IV.

That at all times herein mentioned, defendants E. S. Glanville and H. J. Johnson were citizens and residents of the State of California.

V.

That plaintiff does not know the true name of the defendant sued herein under the fictitious name of First Doe and that when the same is ascertained, plaintiff will pray leave of court to amend this complaint accordingly, together with the appropriate charging allegations.

VI.

That at all times herein mentioned, defendants E. S. Glanville, H. J. Johnson and First Doe, were agents, servants and employees of the defendant Southern Pacific Company, and at all times herein

mentioned were acting in the course and scope of their employment and hiring by the Southern Pacific Company.

VII.

That at all times herein mentioned, Beckwith Road is a public street and highways in the County of Stanislaus, State of California, running in a general easterly and westerly direction; that the said Beckwith Road intersects the tracks of the defendant railroad company at approximately right angles, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99. [14]

VIII.

That plaintiff Geraldine Souza is the surviving wife of Edward Anthony Souza, deceased, and plaintiffs Lawrence Souza and Richard Souza are the surviving minor children of plaintiff Geraldine Souza, and Edward Anthony Souza, deceased, and that said plaintiffs are the sole heirs at law of said decedent.

IX.

That on or about the 11th day of October, 1945, at or about the hour of 9:00 o'clock a.m. thereof, the decedent, Edward Anthony Souza, was a guest passenger in a certain 1941 Ford Coupe automobile, bearing license No. 93H838, owned and operated by John Martin Souza in a general easterly direction on Beckwith Road, at the intersection thereof with the defendant Southern Pacific Company's railroad tracks.

X.

That at said time and place, the defendants E. S. Glanville, H. J. Johnson, and First Doe, while acting within the course and scope of their employment and hiring by the defendant, Southern Pacific Company, were running and operating a certain Southern Pacific Engine No. 2478, Train No. 2-59, the property of the defendant Southern Pacific Company, in a general northerly direction on defendant's railroad tracks, at the intersection thereof with Beckwith Road, as aforesaid.

XI.

That at said time and place, said defendants, and each of them, so carelessly and negligently operated and propelled defendant's locomotive as aforesaid, as to cause said engine to collide with the automobile in which the decedent, Edward Anthony Souza, was riding as a guest passenger as aforesaid, thereby inflicting injuries upon him which immediately resulted in his death.

XII.

That at the time of the happening of the aforesaid [15] accident, Edward Anthony Souza was a well and able-bodied man of the age of twenty-four (24) years, capable of earning and earning the sum of Two Hundred Dollars (\$200.00) per month; that all of said sum said decedent contributed to the plaintiffs as and for their maintenance and support.

XIII.

That by reason of the death of said Edward Anthony Souza, plaintiffs have been further deprived of his care, comfort and society.

XIV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, and the death of said Edward Anthony Souza proximately caused thereby, plaintiffs were compelled to and did incur the following indebtedness:—the sum of Fifty-eight Dollars (\$58.00), as and for hospital expenses for Edward Anthony Souza, the sum of Eighteen Dollars (\$18.00), as and for laboratory expenses for Edward Anthony Souza, the sum of Six Dollars (\$6.00), as and for ambulance service for Edward Anthony Souza, and the sum of One Thousand Forty-seven and 38/100 Dollars (\$1,048.38), as and for funeral expenses, for Edward Anthony Souza, all to plaintiff's damage in the sum of One Thousand One Hundred Twenty-nine and 38/100 Dollars \$1,129.38).

XV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, and the death of said Edward Anthony Souza proximately caused thereby, plaintiffs have been generally damaged to the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiffs pray judgment against de-

endants and each of them in the sum of One Hundred Fifty-one Thousand One Hundred Twenty-nine and 38/100 Dollars (\$151,129.38), together [16] with their costs of suit incurred herein.

/s/ JAMES A. MYERS,

HILDEBRAND, BILLS &
McLEOD,

Attorneys for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed Aug. 12, 1946. [17]

[Title of Superior Court and Cause.]

ANSWER

Comes now, Southern Pacific Company, a corporation, and E. S. Glanville, and each severally answering shows as follows:

I.

Admits the allegations of Paragraph I and further admits as follows:

At all times herein mentioned, defendant Southern Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business as a common carrier by railroad in interstate commerce in the State of California and other States, with its California principal place of business in the City and County of San Francisco, State of California. At all times herein mentioned, [18] defendants E. S. Glanville and H. J. Johnson were

employees of defendant Southern Pacific Company, were acting in the course and scope of their employment and hiring and were citizens and residents of the State of California.

At all times herein mentioned, Beckwith Road is a county road in the County of Stanislaus, State of California, running in a general easterly and westerly direction, and intersects the tracks of defendant Southern Pacific Company at an angle, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99.

On October 11, 1945, at or about the hour of 9:02 a.m., Antonio Azevedo Souza was riding in a 1941 Ford Coupe automobile easterly along said Beckwith Road with his sons, John Martin Souza and Edward A. Souza. At said time and place, defendants E. S. Glanville and H. J. Johnson were operating Southern Pacific Company engine No. 2478, Train No. 2-59, in a general northerly direction along said railroad tracks, and approaching the intersection of Beckwith Road with said tracks. As said engine reached said intersection, John Martin Souza drove said automobile on to said railroad tracks and collided with said engine. In this collision, Antonio Azevedo Souza was killed.

II.

Defendants above named each is without sufficient information and belief on the subject sufficient to enable it or him to answer the allegations contained in Paragraphs III, V, VIII, XII, XIII

and XIV, and on such ground each denies each and every allegation contained therein. Defendant Southern Pacific Company denies that it, or any of its officers, agents, servants or employees was negligent in the premises or in respect of any of the matters alleged in the complaint. Defendant E. S. Glanville [19] denies that he was negligent in the premises or in respect of any of the matters alleged in the complaint. Each defendant above named severally denies that any alleged negligence thereof was a cause, proximate or otherwise, of the accident, injuries, death or damages, if any, alleged by the complaint.

And for a second, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. Antonio Azevedo Souza was negligent in those matters alleged in the complaint, negligently conducted himself in and rode in said automobile, and negligently conducted himself in and about the maintenance, driving, operation and control of said automobile, with the result that said automobile collided with said engine. The conduct, as aforesaid, of said Antonio Azevedo Souza proximately caused and contributed to said collision, the death of Antonio Azevedo Souza, and to the damages, if any, alleged by plaintiffs.

And for a third, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. At said time and on said occasion, John Martin Souza negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing and thereby caused said automobile [20] to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, proximately caused and contributed to the accident, the death of Antonio Azevedo Souza, and the damages, if any, alleged by plaintiff.

And for a fourth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. At said time and on said occasion, John Martin Souza negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing and thereby

caused said automobile to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, was the sole cause, and the sole proximate cause, of the accident, the death of Antonio Azevedo Souza, and the damages, if any, alleged by plaintiffs.

And for a fifth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges, and incorporates herein all the matters alleged in Paragraph I of the first answer and defense above set forth. Each said defendant is informed and believes, and on such ground each alleges that at said time and place, and on said occasion, said Antonio Azevedo Souza and said John Martin Souza, in the operation and driving of said automobile, were engaged in a joint undertaking and venture, and that said Antonio Azevedo Souza in the [21] premises had the right to control the manner of maintenance, driving, operation and control of said automobile, and at said time and on said occasion and in all the circumstances aforesaid, said automobile was being maintained, driven, operated and controlled for the joint benefit of said Antonio Azevedo Souza and John Martin Souza.

And for a sixth, separate and independent answer and defense, defendants Southern Pacific Com-

pany and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges, and incorporates herein all the matters alleged in Paragraph I of the first answer and defense above set forth. Each said defendant is informed and believes, and on such ground each alleges that said John Martin Souza was the agent of said Antonio Azevedo Souza, and John Martin Souza was acting in the scope and course of said agency while maintaining, driving, operating and controlling said automobile. At said time and on said occasion mentioned in the complaint and herein, John Martin Souza, acting as agent as aforesaid, for Antonio Azevedo Souza, so negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing that said automobile was proximately caused to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, proximately caused and contributed to the accident, the death of Antonio Azevedo Souza, and the damages, if any, alleged by plaintiff.

Wherefore, said defendants, and each of them prays that plaintiffs take nothing by their complaint on file herein; that defendants, and each of them go hence without day; that defendants and each of them have judgment for costs of suit in-

curred herein; and for such other, different and further relief, as, the premises considered, is proper.

Dated: December 7, 1946.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Defendants Southern Pacific Company and E. S. Glanville.

(Duly Verified.)

(Affidavit of Service by Mail.)

[Endorsed]: Filed Dec. 9, 1946. [23]

[Title of Superior Court and Cause.]

ANSWER

Comes now, Southern Pacific Company, a corporation, and E. S. Glanville, and each severally answering shows as follows:

Admits the allegations of Paragraph I of the first alleged cause of action, and those portions of Paragraph I of the second alleged cause of action which incorporate by reference the provisions of Paragraph I of the first alleged cause of action, and further admits as follows:

At all times herein mentioned, defendant Southern [25] Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business as a common carrier by railroad in interstate commerce in the State of California and other

States, with its California principal place of business in the City and County of San Francisco, State of California. At all times herein mentioned, defendants E. S. Glanville and H. J. Johnson were employees of defendant Southern Pacific Company, were acting in the course and scope of their employment and hiring and were citizens and residents of the State of California.

At all times herein mentioned, Beckwith Road is a county road in the County of Stanislaus, State of California, running in a general easterly and westerly direction, and intersects the tracks of defendant Southern Pacific Company at an angle, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99.

On October 11, 1945, at or about the hour of 9:02 a.m., John Martin Souza was driving a 1941 Ford Coupe automobile easterly along said Beckwith Road with his father, Antonio Azevedo Souza, and his brother, Edward A. Souza. At said time and place, defendant E. S. Glanville and H. J. Johnson were operating Southern Pacific Company engine No. 2478, Train No. 2-59, in a general northerly direction along said railroad tracks, and approaching the intersection of Beckwith Road with said tracks. As said engine reached said crossing, John Martin Souza drove said automobile on to said railroad tracks and collided with said engine. In this collision, John Martin Souza was injured, the nature and extent of which injuries being unknown to either defendant.

II.

Defendants above named each is without information [26] or belief on the subject sufficient to enable it or him to answer the allegations of Paragraphs III and V of the first alleged cause of action, or those portions of Paragraph I of the second alleged cause of action which incorporate by reference the provisions of Paragraph III and V of the first alleged cause of action, or the allegations in respect of the injuries, medical and hospital expenses, or the allegations in respect of the damage to said automobile, and on such ground denies each and every such allegation. Defendant Southern Pacific Company denies that it, or any of its officers, agents, servants or employees was negligent in the premises or in respect of any of the matters alleged in the complaint. Defendant E. S. Glanville denies that he was negligent in the premises or in respect of any of the matters alleged in the complaint. Each defendant above named severally denies that any alleged negligence thereof was a cause, proximate or otherwise, of the accident, injuries, death or damages, if any, alleged by the complaint.

And for a second, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each repeats, realleges and incorporates herein all the matters set forth in

Paragraph I of the first answer and defense. John Martin Souza was negligent in those matters alleged in the complaint, and negligently drove said automobile, with the result that said automobile collided with the engine and John Martin Souza was injured. The conduct, as aforesaid, of John Martin Souza proximately caused and contributed to said accident, injuries and damages, if any, alleged by plaintiff. [27]

And for a third, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each repeats, realleges and incorporates herein all the matters set forth in Paragraph I of the first answer and defense. John Martin Souza was negligent in those matters alleged in the complaint, and negligently drove said automobile, with the result that said automobile collided with the engine and John Martin Souza was injured. The conduct, as aforesaid, of John Martin Souza, was the sole cause, and the sole proximate cause, of said accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, said defendants, and each of them prays that plaintiffs take nothing by their complaint on file herein; that defendants, and each of them go hence without day; that defendants and each of them have judgment for costs of suit in-

curred herein; and for such other, different and further relief, as the premises considered, is proper.

Dated: December 7, 1946.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Defendants Southern Pacific Company, and E. S. Glanville.

(Duly Verified.)

(Acknowledgment of Service by Mail.)

[Endorsed]: Filed Dec. 9, 1946. [28]

[Title of Superior Court and Cause.]

ANSWER

Comes now, Southern Pacific Company, a corporation, and E. S. Glanville, and each severally answering shows as follows:

I.

Admits the allegations of Paragraph I and further admits as follows:

At all times herein mentioned, defendant Southern Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business as a common carrier by railroad in interstate commerce in the State of California and other States, with its [30] California principal place of business in the City and County of San Francisco, State of California. At all times herein mentioned, defend-

ants E. S. Glanville and H. J. Johnson were employees of defendant Southern Pacific Company, were acting in the course and scope of their employment and hiring and were citizens and residents of the State of California.

At all times herein mentioned, Beckwith Road is a county road in the County of Stanislaus, State of California, running in a general easterly and westerly direction, and intersects the tracks of defendant Southern Pacific Company at an angle, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99.

On October 11, 1945, at or about the hour of 9:02 a.m., Edward A. Souza was riding in a 1941 Ford Coupe automobile easterly along said Beckwith Road with his brother, John Martin Souza, and his father, Antonio Azevedo Souza. At said time and place, defendants E. S. Glanville and H. J. Johnson were operating Southern Pacific Company engine No. 2478, Train No. 2-59, in a general northerly direction along said railroad tracks, and approaching the intersection of Beckwith Road with said tracks. As said engine reached said intersection, John Martin Souza drove said automobile on to said railroad tracks and collided with said engine. In this collision, Edward A. Souza was killed.

II.

Defendants above named each is without sufficient information and belief on the subject sufficient to enable it or him to answer the allegations contained in Paragraphs III, V, VIII, XII, XIII and XIV,

and on such ground each denies each and every allegation contained therein. Defendant Southern Pacific Company denies that it, or any of its officers, agents, servants [31] or employees was negligent in the premises or in respect of any of the matters alleged in the complaint. Defendant E. S. Glanville denies that he was negligent in the premises or in respect of any of the matters alleged in the complaint. Each defendant above named severally denies that any alleged negligence thereof was a cause, proximate or otherwise, of the accident, injuries, death or damages, if any, alleged by the complaint.

And for a second, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. Edward A. Souza was negligent in those matters alleged in the complaint, negligently conducted himself in and rode in said automobile, and negligently conducted himself in and about the maintenance, driving, operation and control of said automobile, with the result that said automobile collided with said engine. The conduct, as aforesaid, of said Edward A. Souza proximately caused and contributed to said collision, the death of Edward A. Souza, and to the damages, if any, alleged by plaintiffs.

And for a third, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. At said time and on said occasion, John Martin Souza negligently, carelessly and unlawfully [32] maintained, operated, drove and controlled said automobile into and upon said crossing and thereby caused said automobile to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, proximately caused and contributed to the accident, the Death of Edward A. Souza, and the damages, if any, alleged by plaintiff.

And for a fourth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. At said time and on said occasion, John Martin Souza negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing and thereby caused said automobile to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, was the sole cause, and the sole

proximate cause, of the accident, the death of Edward A. Souza, and the damages, if any, alleged by plaintiffs.

And for a fifth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges, and incorporates herein all the matters alleged in Paragraph I of the first answer and defense above set forth. Each said defendant is informed and believes, and on such ground each alleges that at said time and place, and on said occasion, said Edward A. Souza and said John Martin Souza, in the operation and driving of said [33] automobile, were engaged in a joint undertaking and venture, and that said Edward A. Souza in the premises had the right to control the manner of maintenance, driving, operation and control of said automobile, and at said time and on said occasion and in all the circumstances aforesaid, said automobile was being maintained, driven, operated and controlled for the joint benefit of said Edward A. Souza and John Martin Souza.

And for a sixth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges, and incorporates herein all the matters alleged in Paragraph I of the first answer and defense above set forth. Each said defendant is

informed and believes, and on such ground each alleges that said John Martin Souza was the agent of said Edward A. Souza, and John Martin Souza was acting in the scope and course of said agency while maintaining, driving, operating and controlling said automobile. At said time and on said occasion mentioned in the complaint and herein, John Martin Souza, acting as agent as aforesaid, for Edward A. Souza, so negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing that said automobile was proximately caused to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, proximately caused and contributed to the accident, the death of Edward A. Souza, and the damages, if any, alleged by plaintiff.

Wherefore, said defendants, and each of them prays that plaintiffs take nothing by their complaint on file herein; that defendants, and each of them go hence without day; that [34] defendants and each of them have judgment for costs of suit incurred herein; and for such other, different and further relief, as, the premises considered, is proper.

Dated: December 7, 1946.

/s/ A. B. DUNNE,

/s/ DUNNE AND DUNNE,

Attorneys for Defendants Southern Pacific Company, and E. S. Glanville.

(Duly Verified.)

(Acknowledgment of Service by Mail.)

[Endorsed]: Filed Dec. 9, 1946. [35]

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 356358

JOSEPHINE SOUZA, individually, and as guardian ad litem for
JOHN MARTIN SOUZA, LUCILLA JOSEPHINE SOUZA,
JAMES LAWRENCE SOUZA, and BENJAMIN SOUZA, minors,
and MARY ADELE SOUZA, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, E. S. GLAN-
VILLE, H. J. JOHNSON and FIRST DOE,

Defendants.

No. 356359

JOHN MARTIN SOUZA, a minor, by and through his guardian ad
litem, JOSEPHINE SOUZA, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, E. S. GLAN-
VILLE, H. J. JOHNSON and FIRST DOE,

Defendants.

No. 356360

GERALDINE SOUZA, LAWRENCE SOUZA, and RICHARD
SOUZA, minors, by and through their guardian ad litem, H. G.
EASTMAN, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, E. S. GLAN-
VILLE and H. J. JOHNSON and FIRST DOE,

Defendants.

STIPULATION AND ORDER CONSOLIDATING CASES

It Is Hereby Stipulated by and between plain-
tiffs, in the above-entitled causes, and each of them,
and Southern Pacific Company and E. S. Glan-
ville, defendants in each of the above entitled cases,
by and through their respective counsel, that the
several cases above entitled may be consolidated
into one action in this court, and the orders, pro-

ceedings and pleadings theretofore had in said actions respectively, stand as orders and proceedings in the consolidated case, and the consolidated case proceed under the title and number as follows: "John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, Benjamin Souza, minors, by and through their guardian ad litem Josephine Souza, Josephine Souza individually, and Mary Adele Souza; and Geraldine Souza, Lawrence Souza, and Richard Souza, minors, by and through their guardian ad litem, H. G. Eastman, Plaintiffs, vs. Southern Pacific Company, a corporation, E. S. Glanville, and H. J. Johnson, and First Doe, Defendants, No. 356358, Consolidated Cause."

Dated: April 1, 1947.

/s/ JAMES A. MYERS,

/s/ HILDEBRAND, BILLS &
McLEOD,

Attorneys for respective
parties plaintiff.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for defendants, Southern Pacific Co.
and E. S. Glanville.

So ordered this 10th day of April, 1947.

Dated: April 10, 1947.

/s/ GEORGE W. SCHONFELD,

Judge of the Superior Court.

[Endorsed]: Filed April 10, 1947. [38]

[Title of Superior Court and Cause No. 356,358.]

PETITION OF SOUTHERN PACIFIC COMPANY FOR REMOVAL OF THE ABOVE-ENTITLED SUIT FROM THE ABOVE-ENTITLED COURT TO THE UNITED STATES DISTRICT COURT.

To the Honorable, the Superior Court of the State of California, in and for the City and County of San Francisco:

Your petitioner, Southern Pacific Company, a corporation, petitions to remove the above-entitled cause from the above-entitled Court to the District Court of the United States [39] in and for the Northern District of California, Southern Division, respectfully shows:

I.

Your petitioner, Southern Pacific Company, at the time of the commencement of the above-entitled suit and action, and at all times mentioned in the complaint in said action, and herein, was, and it now is, a corporation duly created, organized and existing under and by virtue of the laws of the State of Kentucky but of no other state, and at all of said times was not, and is not now, a citizen or resident of the State of California or of any state other than the State of Kentucky.

II.

Your petitioner, Southern Pacific Company, is a defendant in the above-entitled action and as such files and presents this petition for removal.

III.

The above-entitled action was commenced in the above-entitled Court by the filing of three complaints therein on August 12, 1946. Upon the commencement of each action, summons was issued therein. The first action was entitled "Josephine Souza, individually and as guardian ad litem for John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, and Benjamin Souza, Minors, and Mary Adele Souza, Plaintiffs, v. Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe, Defendants," and was numbered No. 356,358 by the Clerk of this Court. A copy of said summons and complaint was served on your petitioner, defendant Southern Pacific Company, and on defendant E. S. Glanville. Thereafter, on December 9, 1946, and within time allowed defendants Southern Pacific Company and E. S. Glanville appeared herein and filed their answer herein. [40]

IV.

At the time of the commencement of this action No. 356,358, Josephine Souza, individually and as guardian ad litem for John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, and Benjamin Souza, Minors, and Mary Adele Souza, plaintiffs therein were and now are the only parties plaintiff in said action. Petitioner is informed and believes and upon such ground alleges and said complaint alleges that at the date of filing of said complaint and at all times mentioned herein said plaintiffs and each of them were and now are resi-

dents and citizens of the State of California and not residents nor citizens of the State of Kentucky.

V.

In said complaint and in said action No. 356,358 there were and are now named as defendants only the following: Petitioner Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe. Said complaint alleges that defendants named as E. S. Glanville and H. J. Johnson were citizens and residents of the State of California. Said complaint alleges that defendant First Doe is sued by fictitious name.

VI.

Said H. J. Johnson has not been served with summons and complaint in said action No. 356,358. H. J. Johnson has not appeared in said action as a party. No person has been served with summons and complaint in said action as said fictitiously named defendant, and no persons have appeared in said action as a party, nor has any defendant appeared excepting your petitioner Southern Pacific Company and E. S. Glanville.

VII.

The second action was entitled "John Martin Sousa, [41] a Minor, by and through his guardian ad litem, Josephine Souza, Plaintiff, v. Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe, Defendants," and was numbered No. 356,359 by the Clerk of this Court. A copy of said summons and complaint was served upon your petitioner, defendant Southern Pacific

Company, and on defendant E. S. Glanville. Thereafter, on December 9, 1946, and within time allowed, defendants Southern Pacific Company and E. S. Glanville appeared herein and filed their answer herein.

VIII.

At the time of the commencement of said action No. 356,359, John Martin Souza, a Minor by and through his guardian ad litem, Josephine Souza, plaintiffs therein were and now are the only parties plaintiff in said action. Petitioner is informed and believes and upon such ground alleges and said complaint alleges that at the date of the filing of said complaint and at all times mentioned, said plaintiffs and each of them were and now are residents and citizens of the State of California and not residents nor citizens of the State of Kentucky.

IX.

In said complaint and in said action No. 356,359 there were and are now named as defendants only the following: Petitioner Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe. Said complaint alleges that defendants named as E. S. Glanville and H. J. Johnson were citizens and residents of the State of California. Said complaint alleges that defendant First Doe is sued by fictitious name.

X.

Said H. J. Johnson has not been served with summons and complaint in said action No. 356,359. H. J. Johnson has [42] not appeared in said action as a party. No person has been served with summons

and complaint in said action as said fictitiously named defendant, and no persons have appeared in said action as a party, nor has any defendant appeared excepting your petitioner Southern Pacific Company and E. S. Glanville.

XI.

The third action was entitled "Geraldine Souza, Lawrence Souza and Richard Souza, Minors by and through their guardian ad litem, H. G. Eastman, Plaintiffs, v. Southern Pacific Company, a corporation, E. S. Glanville and H. J. Johnson, and First Doe, Defendants" and was numbered No. 356,360 by the Clerk of this Court. A copy of said summons and complaint was served upon your petitioner, defendant Southern Pacific Company, and upon defendant E. S. Glanville. Thereafter, on December 9, 1946, and within time allowed, defendants Southern Pacific Company and E. S. Glanville appeared herein and filed their answer herein.

XII.

At the time of the commencement of the said action No. 356,360, Geraldine Souza, Lawrence Souza, and Richard Souza, Minors by and through their guardian ad litem H. G. Eastman, plaintiffs therein were and are the only parties plaintiff in said action, Petitioner is informed and believes and upon such ground alleges and said complaint alleges that at the date of the filing of said complaint and at all times mentioned, said plaintiffs and each of them were and now are residents and citizens of the State of California and not residents nor citizens of the state of Kentucky.

XIII.

In said complaint and in said action No. 356,360 there were and now are named as defendants only the following: Petitioner Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe. Said complaint alleges that defendants named as E. S. Glanville and H. J. Johnson were citizens and residents of the State of California. Said complaint alleges that defendant First Doe is sued by fictitious name.

XIV.

Said H. J. Johnson has not been served with summons and complaint in said action No. 356,360. H. J. Johnson has not appeared in said action as a party. No person has been served with summons and complaint in said action as said fictitiously named defendant, and no persons have appeared in said action as a party, nor has any defendant appeared excepting your petitioner Southern Pacific Company and E. S. Glanville.

XV.

On April 10, 1947, pursuant to stipulation of attorneys for respective parties plaintiff and defendants Southern Pacific Company and E. S. Glanville in each of the three actions heretofore mentioned, this Court made and entered its order consolidating said three actions into one action in this Court and ordering that said consolidated case proceed under the title and number as follows: "John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, Benjamin Souza, Minors, by and through their guardian ad litem, Josephine Souza,

Josephine Souza, Individually, and Mary Adele Souza and Geraldine Souza, Lawrence Souza, and Richard Souza, Minors, by and through their Guardian ad litem, H. G. Eastman, Plaintiffs, v. Southern Pacific Company, a corporation, E. S. Glanville and H. J. Johnson, and First Doe, Defendants, No. 356,358, Consolidated Cause.”

XVI.

Petitioner Southern Pacific Company is informed and [44] believes and upon such grounds alleges that defendant E. S. Glanville died subsequent to December 9, 1946, and is now deceased. Any action against him for damages for alleged negligence thereupon terminated, and deceased is no longer a party to this action.

XVII.

Your petitioner, Southern Pacific Company has made and files and offers herewith its bond, with good and sufficient surety, for its entering in the District Court of the United States in and for the Northern District of California, Southern Division, within thirty (30) days from the date of filing this petition, a certified copy of the record in said suit, and for paying all costs that may be awarded by the said District Court of the United States if said District Court shall hold that such suit was wrongfully or improperly removed thereto.

XVIII.

The above-entitled suit and action is of a civil nature at law, of which the District Courts of the United States are given jurisdiction, brought for the recovery of damages claimed in said suit in the

sum of \$151,157.38, and therein claimed to have resulted from the alleged negligence of petitioner, Southern Pacific Company, all as appears from the complaint in said suit. Your petitioner, Southern Pacific Company, wholly contests and denies said claims and each of them. The amount in controversy in said suit exceeds, exclusive of interest and costs, the sum and value of \$3,000.00, and exclusive of interest and costs, is the sum and value of \$151,157.38.

XIX.

On April 19, 1948, the said consolidated cause came on for trial before this Court, sitting with a jury, and petitioner's [45] counsel suggested the fact of the death of said E. S. Glanville, and plaintiffs, by their counsel, announced themselves as ready for trial without having had summons and complaint in said action, or any of the three actions heretofore mentioned, now consolidated in one action served upon said H. J. Johnson or the defendant sued therein by fictitious name and without continuing said action for the service of summons and complaint on said defendants. By announcing themselves as ready for trial, without service of summons and complaint upon said defendants, or any of them, plaintiffs thereby voluntarily elected to proceed with the action against defendant Southern Pacific Company alone and such election amounts to a complete severance of the action as to the non-resident defendant Southern Pacific Company, petitioner herein, as though said action had originally been brought against such

defendant alone. Said action now involves a controversy wholly between citizens of different states, and which can be fully determined between them, that is to say, between said plaintiffs, citizens and residents of the State of California, and non-residents of the State of Kentucky, on one hand, and petitioner herein, a citizen and resident of the State of Kentucky, and a non-resident of the State of California on the other hand, from the time of and after the said announcement by plaintiffs that they were ready for trial without the service of summons and complaint upon said H. J. Johnson or upon the fictitiously named defendant, and there existed and there still exists in said action a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company, which can be fully determined as between said resident plaintiffs and said non-resident defendant without the presence of any of the [46] other defendants as parties in said action, and said separable controversy is of a civil nature at law of which District Courts of the United States have jurisdiction. Upon the said announcement by plaintiffs to proceed with the trial as aforesaid, said action, which prior to and up to the time of said announcement had not been removable to a United States District Court, thereupon and for the first time became removable to the proper United States District Court upon the ground that there existed and still exists a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company, petitioner herein, and upon the further ground that said announcement by

said plaintiffs was a complete severance of the action as to the non-resident defendant Southern Pacific Company, petitioner herein, and, so far as it is concerned, converted said action into a separate action against Southern Pacific Company as effectively as if Southern Pacific Company had originally been made the sole defendant. Thereupon, and promptly after said announcement and before any other step or steps had been taken by petitioner in said action or in the defense thereof, your petitioner filed this, its petition for the removal of the action to the proper United States District Court.

XX.

By reason of the premises, said action is one wholly and solely between the plaintiffs, residents and citizens of the State of California on one hand, and petitioner Southern Pacific Company, a corporation, a resident and citizen of the State of Kentucky on the other hand, and said action is properly removable to the District Court of the United States in and for the Northern District of California, Southern Division. [47]

XXI.

Petitioner shows that by reason of the premises, it desires to and is entitled to have said action removed from the Superior Court of the State of California, in and for the City and County of San Francisco, into the District Court of the United States in and for the Northern District of California, Southern Division.

Wherefore, petitioner prays that this Honorable Court accept its bond as good and sufficient, ap-

proving the same, and make its order for the removal of said suit and action into the District Court of the United States in and for the Northern District of California, Southern Division, pursuant to the Act of Congress in such cases made and provided and to cause the record herein to be certified to said District Court of the United States and to be removed thereto, and that no other further proceedings be had in this suit and action in this Honorable Court, and for such other, further and different relief as, the premises considered, is proper.

SOUTHERN PACIFIC

COMPANY, a corporation,

By LOUIS L. PHELPS,

Petitioner.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Petitioner, Southern Pacific Company.

(Duly Verified.)

[Endorsed]: Filed April 20, 1948. [48]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

It appears to the Court and the Court finds that defendant Southern Pacific Company, a corporation, duly filed herein its verified petition for removal of the above-entitled suit and action to the District Court of the United States in and for the Northern District of California, Southern Division, and duly made, and with said petition duly filed, its bond, conditioned as required by law and as in said petition averred; that prior to filing said petition and bond, defendant Southern Pacific Company duly gave notice thereof to the adverse parts; [50] that after the filing of said petition and bond they were duly and regularly presented to this Court on April 19, 1948, and as noticed in said written notice and within the time within which defendant Southern Pacific Company was required by the laws of the State of California and the rules of this Court to appear or answer or plead to the complaint in said action; and now

The Court having considered the matters presented as aforesaid and being advised in the premises, finds and adjudges that said petition and bond were duly noticed, filed and presented, that the said petition is good, true and sufficient, and that the said bond is good and sufficient, and good cause appearing therefore,

It Is Ordered, Adjudged and Decreed that said bond be, and the same is hereby, accepted as good and sufficient, and the above-entitled suit and ac-

tion be, and it is hereby, removed to the District Court of the United States in and for the Northern District of California, Southern Division; and

It Is Further Ordered that no further steps or proceedings be taken or had in said suit in this Court and that all proceedings and steps in said suit in this Court be, and the same are hereby, stayed.

Done in open court this 19th day of April, 1948.

/s/ MELVYN I. CRONIN,

Judge of the Superior Court.

[Endorsed]: Filed April 20, 1948. [51]

[Title of Court and Cause No. 28040-R.]

DEMAND FOR TRIAL BY JURY

To the Defendants Above Named and to A. B. Dunne and Dunne & Dunne, Their Attorneys:

You, and each of you, are hereby notified that plaintiffs above named demand a trial by jury in the above-entitled cause in accordance with Rule 38 B of the Rules of Civil Procedure of the above-entitled Court; reserving, however, any right plaintiff may have in connection with motion to remand.

Dated: May 13, 1948.

HILDEBRAND, BILLS &
McLEOD,

JAMES A. MYERS,

Attorneys for Plaintiffs.

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 14, 1948. [52]

In the District Court of the United States for the
Northern District of California,
Southern Division

No. 28040-R

JOHN MARTIN SOUZA, LUCILLE JOSEPH-
INE SOUZA, JAMES LAWRENCE SOUZA,
BENJAMIN SOUZA, Minors, by and through
their guardian ad litem, JOSEPHINE SOUZA,
JOSEPHINE SOUZA, Individually, and
MARY ADELE SOUZA and GERALDINE
SOUZA, LAWRENCE SOUZA and RICH-
ARD SOUZA, Minors, by and through their
guardian ad litem, H. G. EASTMAN,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, E. S. GLANVILLE and H. J. JOHNSON
and FIRST DOE,

Defendants.

NOTICE OF MOTION TO REMAND

To the Defendants Above Named and to Their At-
torneys Herein:

You, and each of you, please take notice that
plaintiffs in the above-entitled action will move the
above-entitled Court to remand the within action to
the Superior Court of the State of California, in
and for the City and County of San Francisco.

Said motion will be made in the courtroom of the
above-entitled Court on Monday, May 24, 1948, at
the hour of ten o'clock a.m., or as soon thereafter
as counsel may be heard. [53]

Said motion will be made upon all the records and files of the within action and upon the Motion to Remand attached hereto.

JAMES A. MYERS,

CLIFTON HILDEBRAND,

Attorneys for Plaintiffs. [54]

[Title of District Court and Cause.]

ORDER SHORTENING TIME

Good Cause Appearing Therefor, it is hereby ordered, adjudged and decreed that the time for service of Notice of Motion to Remand and Motion to Remand is hereby shortened and that said Notice and Motion may be served upon the defendants through their respective counsel at any time prior to 12:00 noon, May 20, 1948.

MICHAEL J. ROCHE,

Judge of the United States District Court.

[Title of District Court and Cause.]

MOTION TO REMAND

To the Honorable United States District Court,
Northern District of California, Southern Division:

Now come plaintiffs above named and move the Court to remand the above-entitled cause to the Superior Court of the State of California, in and for the City and County of San Francisco, from whence it was removed for trial for the following reasons:

I.

Because some of the defendants herein are residents and [56] citizens of the State of California and plaintiffs are residents of the State of California, and the defendant Southern Pacific Company, is a resident corporation duly incorporated under and by virtue of the laws of the State of Kentucky; that there is involved in this suit no separable controversy which is wholly between citizens of another state on the one hand and citizens of the State of California on the other hand, all of which facts are apparent from the record in this case.

II.

In its petition for removal which was acted upon by the Superior Court of the State of California, in and for the City and County of San Francisco, the defendant Southern Pacific Company alleges in Paragraph XIX:

“On April 19, 1948, the said consolidated cause came on for trial before this Court sitting with a jury, and petitioner’s counsel suggested the fact of the death of said E. S. Glanville, and plaintiffs, by their counsel, announced themselves as ready for trial without having had summons and complaint in said action, or any of the three actions heretofore mentioned, now consolidated in one action served upon said H. J. Johnson or the defendant sued therein by fictitious name and without continuing said action for the service of summons and complaint on said defendants. By announcing themselves as ready for trial, without service of summons and complaint upon said defendants, or any

of them, plaintiffs thereby voluntarily elected to proceed with the action against defendant Southern Pacific Company alone and such election amounts to a complete severance of the action as to the non-resident defendant Southern Pacific Company, petitioner herein, as though said action had originally been brought against such defendant alone. Said action now involves a controversy wholly between citizens of different states, and which can be fully determined between them, that is to say, between said plaintiffs, citizens and residents of the State of California, and non-residents of the State of Kentucky, on one hand, and petitioner herein, a citizen and resident of the State of Kentucky, and a non-resident of the State of California on the other hand, from the time of and after the said announcement by plaintiffs that they were ready for trial without the service of summons and complaint upon said H. J. Johnson or upon the fictitiously named defendant, and there existed and there still exists in said action a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company, which can be fully determined as between said resident plaintiffs and said non-resident defendant without the presence of any of the other defendants as parties in said action, and said separable controversy [57] is of a civil nature at law of which District Courts of the United States have jurisdiction. Upon the said announcement by plaintiffs to proceed with the trial, as aforesaid, said action, which prior to and up to the time of said announce-

ment had not been removable to a United States District Court, thereupon and for the first time became removable to the proper United States District Court upon the ground that there existed and still exists a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company, petitioner herein, and upon the further ground that said announcement by said plaintiffs was a complete severance of the action as to the non-resident defendant Southern Pacific Company, petitioner herein, and, so far as it is concerned, converted said action into a separate action against Southern Pacific Company as effectively as if Southern Pacific Company had originally been made the sole defendant. Thereupon, and promptly after said announcement and before any other step or steps had been taken by petitioner in said action or in defense thereof, your petitioner filed this, its petition for the removal of the action to the proper United States District Court.

In this connection plaintiffs allege that for several days prior to April 19, 1948, their counsel James A. Myers had been in consultation with the defendants' attorney, A. B. Dunne, on at least two occasions concerning the prospect of settlement and also the prospect of having the cases tried on a day certain and as a result of such consultation it was agreed that the consolidated cause could go to trial on April 19, 1948; that at no time up to the time of answering "ready" when the cases were called on said date did said attorney A. B. Dunne

suggest the fact of the death of the defendant E. S. Glanville; that as disclosed by the record of the proceedings, plaintiff's counsel was taken by surprise after he had announced "ready" when the case was called when the defendants attorney thereupon filed a death certificate disclosing that said E. S. Glanville had died in November, 1947, and admittedly so far as said defendant's death is concerned, plaintiffs' counsel had no knowledge of this fact until it was thus disclosed; that after disclosing the fact of the death of said E. S. Glanville defendant's attorney then filed their petition for removal of said cause from the Superior Court of the State of California, in and for the City and County of San Francisco, [58] to the said United States District Court;

III.

That under the circumstances there could have been no election to proceed against the defendant Southern Pacific Company alone; that as a matter of fact since the removal of said cause, the whereabouts of the defendant H. J. Johnson was ascertained and he was thereupon served with process on May 12, 1948, and that the said H. J. Johnson, a resident of the State of California at the time of the happening of the accident in question, is a necessary and proper defendant in said cause; that in any event the defendant E. S. Glanville having been a necessary and proper party defendant, a resident of the State of California, and living at the time of the service of process upon him and his

subsequent appearance in said cause said defendant Southern Pacific Company acquired no right by the mere fact of his death to have the trial of said cause removed from the Superior Court of the State of California, in and for the City and County of San Francisco, to the said United States District Court. (*Halsey v. Minnesota-South Carolina Land & Timber Co.*, 54 Fed. (2) 933.)

Wherefore, plaintiffs respectfully submit that this Court has no jurisdiction to try and determine this case, and pray that the same may be remanded to the Superior Court of the State of California in and for the City and County of San Francisco from whence it came.

Respectfully submitted,

JAMES A. MYERS,

CLIFTON HILDEBRAND,
Attorneys for Plaintiffs.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed May 20, 1948. [59]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO REMAND

It Is Ordered that plaintiffs' motion to remand the above-entitled cause to the Superior Court of the State of California, in and for the City and County of San Francisco, be and the same hereby is Denied.

The record on removal discloses that the only defendants who were served with process and appeared in the state court action were the non-resident Southern Pacific Company and the resident engineer; that prior to the trial date the engineer died, unknown to plaintiffs; that when the case was called for trial and plaintiffs' counsel answered "Ready," defendant Southern Pacific Company's counsel presented to the court the engineer's death certificate, together with its petition and bond for removal on the ground that there now existed a separable controversy wholly between citizens of different states. The case was thereupon removed to this court. While it is unfortunate that plaintiffs were taken by surprise, the fact remains [60] that the resident defendant's death left a controversy solely between citizens of different states, with a consequent right of removal. For this reason the motion to remand is denied.

Dated: June 28th, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed June 28, 1948. [61]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiffs and assess the damages against the Defendant in the sum of \$1150.00 on behalf of the Plaintiff John Martin Souza etc., in the sum of \$31,047.38 on behalf of the Plaintiff Geraldine Souza et al., and in the sum of \$16,157.38 on behalf of the Plaintiff Josephine Souza, et al.

Dated this 23rd day of July, 1948.

R. R. LOCKHART,
Foreman.

[Endorsed]: Filed at 7 o'clock and 05 min. p.m.
July 23, 1948. [62]

In the Southern Division of the United States
District Court for the Northern District
of California.

No. 28040-R

JOHN MARTIN SOUZA, LUCILLE SOUZA,
JOSEPHINE SOUZA, JAMES LAWRENCE
SOUZA, BENJAMIN SOUZA Minors, by and
through their guardian ad litem, etc.

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corp.,
Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on July 20th, 1948, being a day in the July, 1948, Term of this Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; James Myers, Esq., appearing as attorney for the plaintiff, and Arthur B. Dunne, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on the 21st, 22nd and 23rd day of July, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was recorded, viz.: "We, the Jury, find in favor of the plaintiffs and assess the

\$1,150.00 on behalf of the Plaintiff John Martin Souza, etc., in the sum of \$31,047.38 on behalf of the Plaintiff Geraldine Souza, et al, and in the sum of \$16,157.38 on behalf of the plaintiff Josephine Souza, et al. Dated this 23rd day of July, 1948 /s/ R. R. Lockhart, Foreman." and [63] the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiffs do have and recover of and from said defendant the sum of Forty-Eight Thousand Three Hundred Fifty-Four Dollars and Seventy-Six cents (\$48,354.76), together with its costs herein expended, taxed at \$153.45.

Judgment filed this 24th day of July, 1948.

/s/ C. W. CALBREATH,
Clerk.

By /s/ M. R. GRUBIC,
Deputy.

Entered in Civil Docket July 26th 1948.

[Endorsed]: Vol. 5, page 458, J. D. Filed July 24, 1948. [64]

[Title of District Court and Cause.]

NOTICE ON MOTION FOR JUDGMENT AND
OF MOTION FOR NEW TRIAL

To the plaintiffs above named and to their attorneys:

You are each hereby notified that on Monday, the 9th day of August, 1948, at the hour of 10:00 o'clock a. m. on said day, or as soon thereafter as counsel can be heard, or at such other time as the Court may fix, if it does fix a different time, the defendant, Southern Pacific Company, a corporation, by its attorneys, will move the above-entitled court, the division thereof presided over by Honorable Leon R. Yankwich, a Judge of the United States District Court sitting in the United States District Court for the Northern District of California, Southern Division, by assignment, at the Courtroom of said court and division in the United States [65] Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, as follows:

I.

(1) Separately and severally as to each of the plaintiffs, each claim, each cause of action, each group of plaintiffs, and all issues and matters touching the claim for damages on account of injuries to John Martin Souza and/or damage to his automobile, the claim for damages on account of the death of Antonio Azevedo Souza and the claim

for damages on account of the death of Edward Anthony Souza, for an order agreeably to Rule 50(b) of the Federal Rules of Civil Procedure, setting aside the verdict and judgment thereon in the above-entitled matter and directing that judgment be entered in accordance with said defendant's motion for a directed verdict heretofore made. Attached hereto, marked "Exhibit A" and herein incorporated is a draft of the order which defendant proposes.

(2) Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including the transcript of the testimony and proceedings had upon the trial of the above-entitled cause.

(3) Said motion will be made upon the ground that at the close of all of the evidence, the defendant herein made a motion for a directed verdict which should have been granted, but which was denied, and will be made upon all of the grounds heretofore stated as grounds for said motion for directed verdict and will be made upon the following grounds and each of them:

(a) There is no evidence of any negligence [66] on the part of defendant, Southern Pacific Company.

(b) There is no evidence of any negligence on the part of Southern Pacific Company which was a proximate cause of any injury or damage complained of.

(c) It appears as matter of law that the negligence of plaintiff John Martin Souza was the sole proximate cause of any injury and damage complained of.

(d) It appears as matter of law that John Martin Souza was guilty of contributory negligence and it appears as matter of law that such negligence on his part is imputed to the deceased Antonio Azevedo Souza by reason of the provisions of the law of the State of California in such cases made and provided, and particularly §352(b) of the Vehicle Code.

(e) It appears a matter of law that Antonio Azevedo Souza was guilty of contributory negligence.

(f) It appears as matter of law that Edward Anthony Souza was guilty of contributory negligence.

II.

(1) Separately and severally as to each of the plaintiffs, each claim, each cause of action, each group of plaintiffs, and all issues and matters touching the claim for damages on account of injuries to John Martin Souza and/or damage to his automobile, the claim for damages on account of the death of Antonio Azevedo Souza and the claim for damages on account of the death of Edward Anthony Souza, for an order agreeably to Rule 59 of the Federal Rules of Civil Procedure, vacating

and setting aside the verdict and judgment herein in favor of plaintiffs and granting to defendant, Southern Pacific Company, a new trial. Attached hereto, marked "Exhibit B" [67] and herein incorporated, is a draft of the order which defendant proposes.

(2) Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including the transcript of proceedings had herein, and all testimony taken on the trial of this case.

(3) Said motion will be made upon the following grounds and each of them severally:

(a) The verdict is against the law.

(b) The verdict is against the weight of evidence.

(c) The verdict is contrary to the evidence.

(d) The evidence is insufficient to sustain the verdict.

(e) The verdict is excessive.

(f) The verdict is against the weight of the evidence and is not sustained by the evidence in that the verdict is excessive and in that it is excessive the verdict is contrary to the evidence and to the weight thereof.

(g) The verdict is excessive and appears to have been given and was given under the influence of passion and/or prejudice.

(h) Errors of law occurring at the trial and

duly objected and excepted to and particularly in the giving of instructions objected and excepted to and in the denial of defendant's proposed instructions to which rulings defendant duly objected and excepted, and rulings upon the admission of evidence and overruling of defendant's objections to evidence and particularly testimony as to statements alleged to have been made by engineer Glanville after the accident out of [68] which this litigation arises.

A. B. DUNNE

DUNNE & DUNNE,

Attorneys for Defendant, Southern Pacific
Company.

[Endorsed]: Filed July 31, 1948. [69]

EXHIBIT A

[Title of District Court and Cause.]

ORDER

Defendant Southern Pacific Company, a corporation, having duly moved the above-entitled court to vacate and set aside the verdict and judgment herein and render and enter judgment in accordance with its motion for a directed verdict heretofore made herein, and the matter having been heard and submitted to the court, and all of the parties having appeared upon the making and hearing of said motion, and the court having considered the same and being advised in the premises, it is

Ordered, adjudged and decreed that the verdict and judgment herein be, and they hereby are, vacated and set aside and that judgment against the plaintiffs and in favor [70] of defendant Southern Pacific Company, a corporation, that plaintiffs take nothing herein and that defendant Southern Pacific Company, a corporation, do have and recover its costs of suit herein be entered in accordance with defendant's motion for a directed verdict heretofore made.

Done in Open Court this day of....., 1948.

.....,
District Judge. [71]

EXHIBIT B

[Title of District Court and Cause.]

ORDER

Defendant Southern Pacific Company, a corporation, having duly moved the above-entitled court to vacate and set aside the verdict and judgment herein and grant to said defendant, Southern Pacific Company, a corporation, a new trial, and the matter having been heard and submitted to the court, and all of the parties having appeared upon the making and hearing of the said motion, and the court having considered the same and being advised in the premises, it is

Ordered, adjudged and decreed that the verdict and judgment herein be and they hereby are vacated and set aside and a new trial of this action is hereby granted to defendant, Southern Pacific Company, a corporation.

Done in Open Court this .. day of,
1948.

.....,

District Judge. [72]

(Affidavit of Service by Mail.)

[Endorsed]: Filed July 31, 1948. [73]

[Title of District Court and Cause.] .

RULING ON MOTION FOR DIRECTED
VERDICT AND ON MOTION
FOR NEW TRIAL

I.

The Motion of the defendant Southern Pacific Company, a corporation, for an order under Rule 50(b) of the Federal Rules of Civil Procedure, to set aside the verdict and judgment in each of said consolidated cases, and to direct judgment therein in accordance with the motion of the defendant for a directed verdict, and each of them, is denied.

II.

The Motion of the defendant Southern Pacific Company, a corporation, under Rule 5 of the Federal Rules of Civil Procedure for an order vacating and setting aside the verdict and judgment in each of said consolidated cases, and to grant the defendant Southern Pacific Company, a corporation, a new trial therein, is hereby denied.

Dated this 22nd day of September, 1948.

LEON R. YANKWICH,
Judge, United States District
Court.

[Endorsed]: Filed September 22, 1948. [74]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, defendant in the above-entitled action, deeming itself aggrieved by the judgment in the above-entitled action does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of July 23rd, 1948 herein and the judgment stamped filed on the 24th day of July, 1948, and entered on July 26, 1948, in Volume 5 of the Book of Judgments at page 458 thereof in the office of the Clerk of the above-entitled District Court.

Dated: October 21st, 1948.

A. B. DUNNE

DUNNE & DUNNE,

Attorneys for Southern Pacific Company, a corporation, Defendant and Appellant.

[Endorsed]: Filed October 21, 1948. [75]

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents:

That we, Southern Pacific Company, a corporation, as principal, and Indemnity Insurance Company of North America, a corporation, as surety, are held and firmly bound unto John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, Benjamin Souza, Minors, by and through their guardian ad litem, Josephine Souza, Josephine Souza, individually, and Mary Adele Souza and Geraldine Souza, Lawrence Souza and Richard Souza, Minors, by and through their guardian ad litem, H. G. Eastman, plaintiffs above named, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to them, their heirs, executors, successors [76] or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, 1948.

Whereas, on July 24, 1948, in an action depending in the United States District Court for the Northern District of California, Southern Division, between the above named plaintiffs and the above named defendants, a judgment was rendered against defendant Southern Pacific Company, and said defendant Southern Pacific Company having duly filed Notice of Appeal from said judgment;

Now, therefore, the condition of this obligation is such that if the said appellant Southern Pacific Company shall prosecute its appeal to final effect and pay all costs if the appeal be dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment be modified, then the above obligation shall be void; otherwise to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,
a corporation, Principal,

(Seal) By LAWRENCE L. HOWE,
General Attorney.

Attest:

THEODORE WRIGHT,
Assistant Secretary.

INDENMNITY INSURANCE COMPANY OF
NORTH AMERICA, a corporation, Surety,

(Seal) By GEORGE L. HOGG,
Attorney in Fact.

(Verification of Surety.)

[Endorsed]: Filed October 21, 1948. [77]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Southern Pacific Company, a corporation, Defendant in the above-entitled action, and appellant to the United States Court of Appeals for the Ninth Circuit from the Judgment in said action, hereby designates for inclusion in the record on appeal all of the record and records, proceedings and evidence in the above-entitled matter.

Without restricting the foregoing, there is hereby designated for inclusion in the record on appeal all of the [78] matters referred to in Rule 75(g) of the Rules of Civil Procedure and a complete Reporter's Transcript of all proceedings, including all proceedings on motion for new trial and on motion for judgment notwithstanding the verdict and all of the papers and proceedings to the end that there shall be included therein the complete record and all of the evidence and proceedings in the action.

Dated: October 21st, 1948.

A. B. DUNNE

DUNNE & DUNNE,

Attorneys for Southern Pacific Company, a corporation, Defendant and Appellant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed October 21, 1948. [79]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including January 9, 1949, to file the Record on Appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: November 30, 1948.

MICHAEL J. ROCHE

United States District Court.

[Endorsed]: Filed November 30, 1948. [80]

[Title of District Court and Cause.)

ORDER

Good cause appearing therefor, it is hereby ordered that defendant and appellant Southern Pacific Company may have to and including the 14th day of January, 1949, within which to file and docket the transcript of record on appeal in the above entitled action.

MICHAEL J. ROCHE,

Judge, U. S. District Court.

[Endorsed]: Filed January 13, 1949. [81]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 81 pages, numbered from 1 to 81, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of John Martin Souza, et al., Plaintiffs, vs. Southern Pacific Company, a corporation, et al., Defendants, No. 28040 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$9.70, and that the said amount has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of January, A. D. 1949.

[Seal]

C. W. CALBREATH,

Clerk.

In the Southern Division of the United States
District Court for the Northern District
of California

Before: Hon. Leon R. Yankwich, Judge.

No. 28,040-R (and consolidated cases)

JOHN M. SOUZA, et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion,

Defendant.

REPORTER'S TRANSCRIPT

Tuesday, July 20, 1948

Appearances: For Plaintiffs: Hildebrand, Bills & McLeod, by James Myers, Esq. For the Defendant: Messrs. Dunne & Dunne, by Arthur B. Dunne, Esq.

(A jury having been impaneled and sworn, a recess was declared until 2:00 o'clock P. M. of the same day.) [1*]

Afternoon Session, Tuesday, July 20, 1948
2:00 p. m.

The Court: Let the record show the jury is in the box. Proceed, gentlemen.

Opening Statement on Behalf of the Plaintiff

Mr. Myers: If it please your Honor, ladies and gentlemen, at this time it is customary for lawyers

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

on both sides of the case to outline to the jury what they expect the evidence in the case to show. And, your Honor, at this time may we ask for an order excluding witnesses from the courtroom? I do not know if there are any here now, but there might be during the time I am making my opening statement.

The Court: Have you any of your witnesses here, Mr. Dunne?

Mr. Dunne: No. I think there are none here. I have no objection to such an order and, moreover, I assume that counsel will want an exception to that in the case of the three people who are here, members of the family. They will be witnesses and they are also parties.

Mr. Myers: There is no one here excepting the parties to the action.

The Court: All right. If any witnesses should come in, if you will call my attention—as you know, gentlemen, I am not very enthusiastic about that rule. I think counsel, with all due respect to their long experience, exaggerate the importance of it. Nevertheless, I grant it or do not grant it, depending [2] on the case. If you both want it at this time, I will grant the rule, and if my attention is called to any witnesses, I will instruct them to go to the witness room. I will make the order.

Mr. Myers: In outlining what we expect the evidence to show in these consolidated cases (the evidence that will be produced applies to all three cases) but in outlining what we expect the evidence in this case to show, of course, His Honor

has stated to you already that anything that the attorneys say in what they expect to prove in their opening statement is not evidence and you will disregard it unless we prove it. So with that in mind I would like to make, with His Honor's permission, a rather detailed statement of what we expect the evidence in this case is going to show.

In the first place, ladies and gentlemen, there are three cases, one brought by the young man who was driving the automobile that was involved in this accident, who received certain injuries that were not particularly serious, but a suit was filed in his behalf so that at a later time, and this is the time, all parties might be before the Court, before you ladies and gentlemen of the jury. So that is one of the cases against the Southern Pacific, the driver of the automobile, a young man by the name of John Martin Souza. At the time of the happening of this accident he was 19 years of age, I believe. He is now 21. He has reached the age of majority, but at the [3] time of the happening of the accident he was 19 years of age.

One of the other cases is one brought by Josephine Souza, who is the surviving widow of Antonio Souza, the father of some of the other plaintiffs in this case. The evidence will show of that union, that is, of the marriage of Josephine Souza and Antonio Souza, there were, I believe, five or six children and all of these children have joined in this action, which includes the minor children as well as those who are adults at the present time. The father was a passenger or was riding

in the automobile driven by one of his sons, John Martin Souza.

The other death was of a young man by the name of Edward, I think it was Edward Anthony Souza. Edward was of the age of 24 years at the time of the happening of this accident. The suit that is being prosecuted for his death is brought by Geraldine Souza, his surviving widow, in behalf of herself and in behalf of her minor children, one children of about four years of age, the other approximately three years of age, and I will go into that particular situation a little later, but I am only outlining now the parties involved. At the time Geraldine Souza brought her action she herself was under age, so that her action was prosecuted by her father, Mr. Eastman, as guardian ad litem, not only for her but for her minor children, the three year old boy and the four year old boy. Those are the three cases that will be tried before you ladies and gentlemen of the jury, and as we proceed I think that you will see that [4] the evidence as it affects all of these cases differs in one respect, that is, from the standpoint of Edward Anthony Souza. I think we will prove that he is in the category of what the law calls a guest passenger. His Honor will explain all of that to you at the proper time, and from the standpoint of a guest passenger different rules of law apply that apply from the standpoint of the driver and Mrs. Josephine Souza and her children.

The Court: Who owned the automobile?

Mr. Myers: The evidence will show that John

Martin Souza, this young man who was driving, was the owner of the automobile involved, but because of the fact that he was a minor, the Vehicle Code of the State of California imputes any negligence, if there was any negligence, on the part of the minor, to the person who signed his operator's license or who allowed him to drive an automobile by his express or implied permission. So in that situation, from the standpoint of Mrs. Josephine Souza and the standpoint of her children, that is, the minor children, as well as the adult children, and from the standpoint of John Martin Souza, the same law applies. The evidence will be, however, that Edward Souza was a guest passenger, as I have previously stated, so that a different rule of law that His Honor will give you applies in that case. In other words, if there was any negligence on the part of the driver of the automobile, that can not be imputed to Edward [6] Souza under the evidence in this case, and consequently Geraldine Souza or her minor children would not be bound by any such evidence. That is the theory of it, ladies and gentlemen.

In going into the facts of the case, the evidence will show that for many years prior to October 11, 1945, Mrs. Josephine Souza and her husband, Anthony Souza, resided in the vicinity of Modesto. I think the evidence will show that Josephine Souza as a young girl was raised in Piedmont over here in Oakland and lived there until she had grown into womanhood, and then went to Modesto and married Anthony Souza, who as

a young man had come to this country, but who had lived in the United States most of his lifetime, I think ever since about 1937 or 1938, somewhere in there. In any event, these people had lived in the vicinity of Modesto and had raised a family, all of these children, some of whom are 20—I think the oldest boy, the one who was killed, Edward Souza, was 24 years of age at the time of his death, and as I say, there were five or six children; they were all born and raised right in the vicinity of Modesto.

Geraldine Souza, the other plaintiff in the other action, was likewise raised in the vicinity of Modesto. I think her father is a post office employee or something there, and she married and they started raising their family in the vicinity of Modesto. [6]

On this particular morning, the evidence will show that Geraldine Souza and Edward Souza, the oldest son, lived on the same ranch, or at least nearby, where the elder Mr. Souza lived, he and his family, and they were all engaged in ranching activities. The elder Mr. Souza had owned and operated a dairy I think on this one ranch for about twenty years. The younger Mr. Souza that was killed in this accident was engaged in, I believe, at that time operating a hay press and was in business for himself. The evidence will show he was supporting his wife, Geraldine Souza, and their minor children by means of his own efforts in these ranching enterprises.

The evidence will show that John Martin Souza, the young man who sits here in court, prior to the

time of the happening of this accident, wanted to lease a ranch that was approximately 11 miles from the ranch owned and operated by his father, the elder Souza, and his father had agreed to go with him over to this particular ranch and look at it, see what its possibilities were. I think it had been a dairy ranch. His father knew all about dairying and he wanted his father's opinion before he himself entered into a lease agreement for the lease of that ranch. So he asked not only his father, Antonio Souza, but also his brother, Edward Anthony Souza, to go with him on this particular morning over some place about northeast of Modesto, about 8 miles, I think, northeast of Modesto, to look at this ranch, and they had agreed the night before that they [7] would go with him and look at the ranch and pass their opinion on it and tell him what they thought of this particular ranch property.

They then left the Souza ranch, which the evidence will show was located approximately 3 miles from the intersection of Beckwith Road and the Southern Pacific crossing. That is approximately two and a half to three miles northwest of Modesto.

John took his automobile and his brother Edward Souza got in the automobile alongside of him. It was a 1941 Ford coupe, I think. Then the father, the elder Souza, got in on the outside of the coupe, and they left home somewhere in the vicinity of 9:00 o'clock, possibly a quarter to nine. I think the accident happened somewhere around 9:02 or 9:05 of that morning.

The evidence will show, ladies and gentlemen, that this was a bright October morning, but that, as usual in that country, there was some ground haze or a sort of mist at that time of the morning that lay fairly close to the ground, but the sun was shining, and having in mind the direction that this car was traveling, in almost an easterly direction towards the railroad tracks, as I have labeled them here, and driving east on Beckwith Road, approaching this crosswalk, the sun was approximately just slightly to the right of the driver's position. In other words, the sun was low in the horizon on October 11, 1945, and [8] was shining right in the direction the car was coming from. So it was shining in Mr. Souza's face as he drove along there.

The evidence will show that in driving from his home to the scene of this accident that he drove approximately 35 or 40 miles an hour. The evidence will show that they had ample time to go over to the ranch. There was no particular reason for being in a hurry to get there or get home again. They were going home to look at this ranch on behalf of this young man, John Souza. The evidence will show that they approached the Southern Pacific Railroad tracks here on Beckwith Road, that there are grapevines, a good many grapevines growing on the righthand side of Beckwith Road before you get to the railroad crossing itself. Now, I do not know what effect the presence of these grapevines had on this accident, if any. I merely mention it to you, ladies and gentlemen of the jury, because I am trying to explain to you the physical characteristics

of this crossing where the accident happened, because I think the evidence will show that it is just about 60 feet from the railroad tracks to the end of those grapevines, and there is a little private road, as I have indicated, that comes in here from the southwest and which goes to a house over in this vicinity, and I put it in because it is there; in any event, there is no question about it, and the evidence will show that the young Mr. Souza was very familiar with this particular crossing, because they lived three miles from there, and before he got to the [9] railroad tracks, he started slowing down. I think he will tell you that he was not going over 15 miles an hour as he left the end of these grapevines that are on the righthand side of Beckwith Road or the south side of it, and that after he left this particular vicinity and proceeded towards the railroad tracks, that he was not going over 15 miles an hour for approximately the first 20 or so feet, and that he slowed down by applying his brakes and came to a complete stop there. He came to a complete stop, I think he will tell you, about 20 feet from the railroad crossing. I think the evidence will show, from the standpoint of his testimony, ladies and gentlemen, that after coming to a complete stop, he looked to his right, which was the direction, the evidence will show, the engine afterwards came from. He looked to his right. There was no engine coming within his line of vision, and I think his vision, he will tell you, with the conditions that prevailed that morning, although it was a bright sunny morning, because

of the ground haze—I think he describes it as a sort of a thin gray mist—that lay in the vicinity of the ground, that he could see distinctly approximately 200 yards to his right. In other words, he had a clear view for 200 yards. The evidence will show that after looking to his right that he then looked to his left, and there was no traffic coming on the railroad tracks from that standpoint; that he listened, he heard nothing; he started his car, and had proceeded in low gear over on the railroad tracks, [10] and when he was astride those railroad tracks he again looked up and here, 50 or 75 feet away from him, or approximately 100 feet, whatever it may have been, was this lone engine, an engine that railroad men call running light, bearing down on him out of the mist, and the evidence will show that he did not see the engine, from the standpoint of his being able to see it because of the mist and the fact that the front of that engine, and we will show you a picture of this engine that was painted like it, was painted a silver-aluminum color, which together with the mist and the sun shining in his face, if it was within his line of vision, that is, within the distance he could see down the tracks, was perfectly and completely camouflaged, so that he did not see it, and he drove onto the tracks and, as I say, when he saw it for the first time it was about 50 to 75 feet away from him, and before he could roll off the tracks, he was still in low gear, the engine struck him.

The impact killed his father, inflicted injuries on him, inflicted such injuries on his older brother that he subsequently died.

The evidence will show without any doubt at all, ladies and gentlemen, that this engine not only was, you might say, completely camouflaged because of the weather conditions, the low-hanging gray mist or haze and silver paint on the front of the engine and the sun shining in between the driver and the engine, it was not only completely camouflaged so he couldn't [11] see it, if it was within his line of vision, but also that he did not hear it, because it was making no noise. The evidence will show that engine was running light, was not working steam, was drifting down at a high rate of speed, and the evidence will show that it was going approximately 70 miles an hour as it bore down upon him.

The evidence will show further that the bell was not ringing and neither was the whistle blowing. The evidence will show, ladies and gentlemen, in short, that what happened in this case actually amounted to murder. That is just plainly speaking, and that is what the evidence is going to show, because of the fact that the employees of the railroad company, the engineer and the fireman, in operating that engine, in running light, not only violated the law from the standpoint of state law in failing to sound a bell and whistle continuously, that is, the bell continuously, and the whistle when within a quarter of a mile of a public crossing, that they not only violated the law there, but they also violated all the rules promulgated by the Southern Pacific Company itself for the operation of its locomotives out on the railroad tracks, and under

such circumstances as these, the evidence will show, I believe, and we expect to be able to prove that the speed restrictions placed by the Southern Pacific itself on a light engine, an engine running light such as this, was 45 miles an hour, and we expect to show from the evidence in this case that [12] if the engineer and fireman had complied with the law, had operated their engine not only in accordance with the law but in accordance with the rules of their own company, this accident would never have happened and Mr. Souza, Sr., and the other Mr. Souza would be here today. In other words, this accident could not have happened.

In putting on that proof, ladies and gentlemen—I mention this because it is going to come out in the proof of the case—the evidence is going to show that after this accident happened, the fireman worked for about two weeks longer for the railroad company, and then for some reason or other he could not be found—in other words, he departed from this state, I think, but in any event, he quit his job. The evidence will show that the defendant Glanville, the engineer Glanville, who is now dead—I believe he died last November, some time such as that—that he and the engineer got their heads together and filed with their company a statement as to how this accident happened, and in that statement the bell was ringing and the whistle was blowing and they were only going 40 miles an hour. I think the evidence is going to show that. Now, the evidence is going to further show that Glanville, the engineer, was served. He appeared in the case but,

as I say, he died, and the case was moved to the Federal Court. That is why it is being heard by you ladies and gentlemen, because of the death of the engineer, who was the only resident defendant in the case. [13]

Before this case was to go to trial here in the Superior Court in San Francisco just a few months ago, the fireman, Mr. Johnston, came out here from Pennsylvania, New York, Chicago or some place where he happened to be—I have forgotten now—but the evidence will show it, in order as he said in his deposition, or at least claimed in his deposition which was taken at my office by Mr. Dunne and me, to right a wrong he had done by filing a wrong report to his company. He wanted to tell the truth about what happened. So consequently his deposition was taken. That deposition will be read to you ladies and gentlemen of the jury as to what his version of this accident is, so that, I believe, we will show not only from the standpoint of the other evidence in the case but from the standpoint of the fireman, the man upon whom the duty devolved to ring that bell and keep the bell ringing, was derelict in his duty and he did not ring the bell. He said he did not ring the bell, and also that the whistle was not blown. That is going to be part of the evidence in this case.

In addition to that, the evidence is going to show that a young man by the name of Warren Davis, who was a ranch worker employed in this locality, was driving in approximately the same direction, an easterly direction towards the railroad tracks, on what is North Avenue or North Road,

and he will be here to testify. His deposition was taken because we felt that maybe he would not be available when the case came to [14] trial, but he is available. He is here and he will testify. I think his testimony will be—

The Court: I do not think it is proper to take seriatim testimony of every witness because it creates confusion in the minds of the jury, and you are telling the story of every witness or the contradiction, which is not proper in an opening statement. Counsel has not objected, but an opening statement should not be of that character. I think you have gone into great detail.

Mr. Myers: Very well, your Honor. I will be glad to abide by your Honor's wishes in the matter.

The Court: It won't do you any good because I will tell them to disregard your statement and not to judge what a particular witness testifies on the basis of that. You can't take the testimony of witnesses seriatim. You have never done it in my court before.

Mr. Myers: That was not the purpose. The purpose of talking about this witness was because of the physical conditions that existed that morning.

The Court: I am not interested in your purpose. You should give an outline and not take up individual witnesses and show how they contradicted themselves and point out that the man had a conscience. Wait until you introduce evidence as to contradictions. That is the point. Otherwise you will be here until tomorrow outlining the case, and it doesn't do a bit [15] of good. Your opening statement is not evidence. You must prove some of these matters.

Mr. Myers: Your Honor, I expect to prove them all.

The Court: That is true, but it is not the proper opening statement, to take seriatim the testimony of every witness. I did not object because I thought you would stop some time, but now you are going into all this detail.

Mr. Myers: I will stop.

The Court: Stop right now. From now on limit yourself to general statements of what the evidence will show, without picking up each individual person, please.

Mr. Myers: Thank you, your Honor. The evidence, ladies and gentlemen, is going to show here at a point approximately four-fifths of a mile from where this accident did happen that the same thing practically happened there. The evidence is going to show that this engine, as far back from Beckwith Road as North Avenue, was not sounding its bell or blowing its whistle and, as I say, that will be established by competent witnesses. In short, the evidence in this case, ladies and gentlemen, will show, I believe, to your satisfaction that this accident was caused solely as a result of negligence on the part of the operators of that engine, employees of the Southern Pacific Company. As a result of that negligence on the part of the operators of this particular engine, Mr. Souza, Sr., who was 57 years old, and his son Edward, who was 24, were killed. [16] The young Mr. Souza, John Martin Souza, was injured.

After putting on that evidence we will ask you, ladies and gentlemen, to bring in a verdict in favor of all of the plaintiffs in this case, a verdict in favor of Josephine Souza individually and in favor of the minor children, for the loss of society, comfort and support afforded to them by the elder Mr. Souza during his lifetime. I will ask you to assess the damages in favor of Geraldine Souza, the younger Mrs. Souza, and the widow of Edward Anthony Souza, for the reasonable value or the pecuniary loss of society, comfort and support furnished Mrs. Souza, Geraldine Souza, and their minor children who are now, I think, between three and four years of age.

The evidence will show in that regard, ladies and gentlemen, that one of the children of the younger Souza's is what is called a spastic, suffering from spastic paralysis, and occasions care on the part of both the mother and father during the father's lifetime. The mother spent her time during the day caring for the children and at night time the father assisted in the care of that spastic child. The evidence will show that that spastic child requires a lot of care on the part of someone. The care afforded to it by the father, as I say, during the night time, during his lifetime, is afforded now by the mother entirely.

Predicating your verdict solely upon the evidence introduced at the trial of this case, we will ask you to assess a [17] substantial verdict in favor of Mrs. Souza, Josephine Souza, for the death of her husband, in favor of their minor children for the death of their father, that is, the elder Mr.

Souza, and a substantial verdict in favor of Geraldine Souza for the loss of her husband, and in favor of her minor children, for the loss of their father, that is, the younger Mr. Souza.

As far as the driver of the automobile is concerned, as I say, his suit was filed in order that all cases might be before you at this time, and his damages under the circumstances or under the evidence that will be proved in this case I think will be fairly nominal. As far as his losses are concerned, I think his major item of loss was his automobile, which is damaged to the extent of six hundred or seven hundred dollars, whatever the allegation is, the evidence will show that he received a concussion and some other injuries, nervous shock, as a result of this, but I believe he was back pursuing his line of activities within two or three weeks after this accident happened. I think that, ladies and gentlemen, substantially covers what we think the evidence in this case will show.

The Court: Mr. Dunne?

Mr. Dunne: If your Honor has no objection, and counsel on the other side has said he has no objection, I should like to use two diagrams in the course of the opening statement.

The Court: Yes. Will they be used in the trial of the [18] case?

Mr. Dunne: They will be used in the trial.

The Court: Suppose we call them Court's exhibits.

Mr. Dunne: I am perfectly willing to introduce them as my exhibits, if your Honor please.

The Court: The evidence has not started. If I

adopt the exhibits as my exhibits—it is understood they are just diagrams.

Mr. Dunne: Yes, your Honor.

The Court: Just call them Court's Exhibits 1 and 2.

(The diagrams referred to were thereupon marked Court's Exhibits No. 1 and 2.)

Mr. Dunne: May I put them up on the board?

The Court: Anywhere you want.

Opening Statement on Behalf of the Defendant.

Mr. Dunne: Ladies and gentlemen, if I may, I want to indicate to you in some measure what we think the evidence will show, not in great detail. Primarily I should like to do two things. Of course you understand I am stating simply what I expect the evidence will show as to some things. In the first place, I want to state those things to you about which there will be no dispute, so that we shall not have any false issues, and then without stating the evidence in detail to you on the other matters, I want to tell you what I think the evidence will show, and where they may be some dispute that [19] perhaps serious disputes as to what happened.

Let me say this to you first so there will be no confusion. We may hear in this case about two types of direction. In the first place, there is geographic direction, and on the upper part of these two diagrams the geographic direction has been shown. Running across the diagram straight are first the railroad tracks and then above them Highway 99, and by comparing them with the arrow

indicating geographic direction, you will see the tracks and Highway 99 going from Modesto, which would be to the right of the diagram, up toward Manteca, Sacramento and San Francisco being to the left of the diagram, run roughly from southeast to northwest. Those are geographic directions. For purposes of railroading, in order to avoid the confusion in giving train orders, the men on the railroad use only two directions. Everything which is a movement, a railroad movement, which if continued will ultimately take a train or engine to San Francisco is called a westward movement. Every movement which would take a train away from San Francisco, if continued, is called an eastward movement, without regard for the geographic direction in that particular place. I do not think there will be much confusion here, however, because roughly what the railroad men call west is northwest and what they call east is southeasterly.

The Court: Let me ask you one question. I happen to know that part of the country. It is my home town. I practiced [20] law there seven years. Was this engine engaged in a westerly movement?

Mr. Dunne: A westerly movement.

The Court: That is going north?

Mr. Dunne: Going northwest from Modesto, that is correct. This particular engine some time early this morning, the evidence will show, had left Fresno and was running light. Counsel upon the other side is correct. There will be no dispute about this. It had no cars attached to it. It was running light. The engine number was 2487. I think both

of us were incorrect in our pleadings in calling it 2478. Nothing will turn on that. It was engine 2487, running light as the second section of Trip 59 from Fresno and going up to Sacramento.

Counsel is also correct in telling the time of the accident. The accident here, as we admitted in the answer, was about two minutes past nine in the morning. It may have been a few minutes after that, but it was from two minutes after nine to five minutes after nine at the time the accident happened.

This general area shown in this top map is approximately four miles from the telegraph office at Modesto and from the edge of the city to Modesto, and I would assume that counsel's statement is correct. It is perhaps two or three miles. He referred to North Avenue. North Avenue crosses the railroad track here and turns into Highway 99. Highway 99, as he [21] endeavored to indicate on the drawing on the blackboard, is a divided highway, two lanes toward the top going northwesterly for northwesterly traffic, and the other two lanes at the bottom for southeasterly traffic. Below that is a line of trees and then the railroad track itself, and then a fence, and we expect the evidence to show, if any question is made about it, that these trees that have been drawn on this diagram were not drawn in haphazardly but were accurately located.

Leaving North Avenue and going northwest on Highway 99, there is a turn in the road known as Vale Road and then as indicated on the map there is another turn into Walnut Avenue. Continuing

on Highway 99 to the left of the diagram in a northwesterly direction, there is a group of devices as shown on that diagram. Those represent a gas station, service station and some houses. That is generally to the east side of the highway. To the left of that diagram, on this side, is Beckwith Road, running almost directly east and west, crossing the railroad tracks at an angle and running into Highway 99. There is indicated alongside the side of Beckwith Road a broken line, which is indicated in the lower diagram, which is intended to indicate a fence line. Counsel correctly stated that along that fence they were growing some grapevines.

The devices here, which would be at the south corner of the intersection of Beckwith Road and the railroad track at Highway 99, are intended to represent the buildings of a ranch [22] or a farm that is located at that point. There is indicated here with the word "Sign" a device which was intended to indicate a large display sign which was located there.

The lower diagram is intended to be an enlargement, on a different scale, of the general area about which I am going to draw in pencil. That area that I have enclosed roughly in pencil is shown on the lower of these two diagrams and again to point out roughly what it is intended to show, it is intended to show the northbound lane of Highway 99, the island between the two lanes, the southbound lane of Highway 99, Beckwith Road, the fence where the grapes were growing, these round dots all indicate poles; these are crossing signs,

cross buck white arm signs at the intersection of the railroad, the base of the device shown on the diagram being intended to show the place where the sign is, of course standing up straight. The two rails of the railroad track, markings on the highway, and the buildings of the ranch or farm that is to the left.

To the top of this diagram is the scale, 1 inch on the diagram equals 100 feet on the ground; and the lower diagram is drawn so that 1 inch on the diagram is intended to represent 20 feet on the ground.

I can go over these things briefly as counsel on the other side went over them. These things probably will be beyond dispute. The locomotive was coming along the track light, as shown upon this diagram, from the right of the diagram to the [23] left of the diagram. There is no question about that. There will be a question as to its speed. Secondly, there will be a question as to whether it did or did not sound the signals. We shall produce evidence that signals were sounded. There is no dispute about the fact of a collision at the crossing.

Before I come to that, let me say some other things as to which there will be no dispute, I believe. There is no dispute about the fact that the engineer of the locomotive was Mr. Glanville. There is no dispute about the fact that Mr. Glanville is dead. Counsel correctly stated that he died last November. There is no dispute about the fact that Mr. Johnston was the fireman, H. J. Johnston, spelled with a "t".

The evidence will show, and I think there will

be no dispute about this, that the engine was running in a forward motion and that when so running in a forward motion the place of the engineer is on the righthand side of the cab in the direction of the motion. The place of the fireman is on the lefthand side of the cab in the direction of motion. There will be no dispute about the fact that the automobile was a 1941 Ford coupe. There will be no dispute about the fact that it was owned by John Martin Souza, the son of one of the people in the automobile and brother of the other, and that at the time of this accident he was about 19 years old. There will be no dispute about the fact that he was driving the automobile. There will be no dispute about the fact that the automobile, [24] as it approached the crossing, was going east on Beckwith Road the the point of the accident. There will be a dispute as to whether it stopped before going onto the railroad track. There will be no dispute about the fact that at this crossing the locomotive struck the automobile, and I think the evidence will show that the locomotive struck the rear end of the automobile or somewhere near the rear end, and the automobile was by the impact thrown over onto the far side of the railroad track, at about where that crossing sign was on the far side, and knocked it down.

There will be no dispute about the fact that the young man who was driving the automobile received some sort of injury. I do not know what those injuries were. I take counsel's word for it that they were unimportant. There will be no dispute about the fact that the father, Antonio Vito Souza,

was killed. I think the evidence will show he was killed instantly as a result of this accident. There will be no dispute about the fact that the brother, Edward Anthony Souza, was injured. I think the evidence will show, if it is of any importance, that he died two days later as a result of this accident. In other words, we are making no dispute about the happening of the accident, that there was a collision between the automobile and the train, nor are we making any dispute about the fact that as a result of this collision two of the people in the car, not the driver, were killed, and that the driver received [25] some slight injury.

We expect to show by a variety of evidence that the train was being properly operated. We expect to show that when the driver of the automobile was at a distance of something over 60 feet, 60 to 70 feet from the railroad track approaching it at such an angle, that he was approaching the locomotive, heading at it, so that he did not have to look away over to his side; that the locomotive was approaching in perfectly clear view and could have been seen if he had looked; that he did not stop before the accident happened but drove right onto the track in the face of an approaching locomotive that was in clear view, and we expect to show that not only was the locomotive properly operated, but we expect to show that that the driver of the automobile was grossly negligent; that he was thoroughly familiar with the crossing, and knew exactly where he was, that there was no confusing traffic, there was nothing else to confuse him, and that he drove right in front of an approaching

locomotive, plainly open to his view, because he was grossly negligent in failing to take any care to see the approaching locomotive. The details of what will appear I do not undertake to tell you. I might misstate them from faulty recollection. They will be told to you by the witnesses and you can hear them just as well as I.

The Court: All right. Call your first witness.

JOHN MARTIN SOUZA,

one of the plaintiffs, called in his own behalf;
sworn.

The Clerk: Will you state your name?

A. John Martin Souza.

The Court: Mr. Souza, you speak loud enough so that all the persons in the box and counsel on the other side of the room will hear. You will run competition with the street cars, and some carpenters may be hammering, so we will hear everything you say. Have you ever been in a courtroom before?

A. No.

Q. Don't be nervous. Hold your hands like that, that is a good way of avoiding nervousness. Bear in mind that you must not be nervous, or must not be afraid. They will ask questions, and try to answer them so everybody can hear you. If you go to motion picture shows, I will tell you we don't run the way they do in motion pictures. I ought to know, because I come from a town where they make motion pictures. So take it easy and answer the questions as counsel for both sides propound them to you.

(Testimony of John Martin Souza.)

Direct Examination

Mr. Myers: May I ask, Mr. Souza, that you speak loudly enough so I can hear you with my one good ear.

Q. Where do you reside?

A. In Modesto. [27]

Q. Whereabouts with reference to the town of Modesto? A. It is northwest of Modesto.

The Court: On what road?

A. It is on the Toombs Road.

Q. Where is that with reference to Beckwith Road? A. It is north of Beckwith Road.

Q. Whereabouts does that road intersect Beckwith Road with reference to this particular crossing where the accident happened? In other words, how far down Beckwith Road?

A. Say about three miles from the crossing.

Q. How old are you? A. I am 21.

Q. How old were you on October 11, 1945?

A. I was 19.

Q. What was your father's name?

A. Antonio Souza.

Q. How old was he at that time?

A. He was 57.

Q. Your mother was alive, and still is, is that right? A. Yes, sir.

Q. In addition to your mother and father—and I assume you lived with them, did you?

A. Yes.

Q. On a ranch, or what? A. Yes. [28]

Q. What kind of a ranch?

A. A dairy ranch.

Q. How long had you lived on that ranch?

(Testimony of John Martin Souza.)

A. About 18 years.

Q. In addition to your mother and father and yourself, who else lived there?

A. Well, my brother and his wife and two children.

Q. That was Edward? A. Edward.

Q. Edward Anthony Souza? A. Yes.

Q. At the time he was how old?

A. He was 24.

Q. When you say Edward and his wife, you mean Geraldine Souza, the young woman who sits here in the courtroom? A. That's right.

Q. With your mother? A. That's right.

Q. He was your older brother? A. Right.

Q. Besides him, then, what other members of your family resided there?

A. There was a sister, Mary Adele, another sister, Lucille, and two brothers, James and Lawrence.

Q. How old were your two sisters? [29]

A. My oldest sister was—you mean at the time of the accident?

Q. Yes. A. She was about 22.

Q. That is Mary Adele?

A. Yes. The other was about 17.

Mr. Dunne: I am sorry, I did not hear your words. A. The younger sister was about 17.

Mr. Myers: Q. Her name was Lucille?

A. That's right.

Q. The next brother, or the next one, rather, was a brother; is that right? A. James, yes.

Q. How old was James at that time?

(Testimony of John Martin Souza.)

A. 16.

Q. He was 16. Then your next brother, Benjamin, how old was he? A. He was about nine.

Q. All of the ones that you mentioned lived on this ranch approximately three miles down Beckwith Road, but over on this other road?

A. That's right.

Q. On this particular day you were involved in an accident were you? A. That's right.

Q. Were you driving that car at the time?

A. Yes.

Q. What kind of an automobile was that?

A. It was a 1941 Ford coupe.

Q. Were you the owner of that cabriole coupe?

A. That's right.

Q. In it at the time of the accident's happening was who, besides yourself?

A. There was my brother Edward and my father, Anthony.

Q. Where was Edward seated in the car?

A. He was sitting next to me, on my right.

Q. Who was sitting to the right of him?

A. My dad.

Q. Where had all of you got into this automobile? A. At my home.

Q. Where were you going at the time the accident happened?

A. We were going to look at a ranch.

Q. That ranch was located where?

A. It was located south of Modesto.

Q. South of Modesto? A. That's right.

Q. On Highway 101? A. No.

(Testimony of John Martin Souza.)

Q. I mean Highway 99, I am sorry.

A. No, it wasn't on Highway 99. It was in a southeasterly [31] direction from Modesto.

The Court: What road was that?

A. It was the Claus Road.

The Court: Pardon me. So you will understand, that is my home town. I began practicing law there, and all the roads around Modesto are named, there is the Maize Road, the McHenry Road, and all those which are not part of the highway system have a name, named for some distinguished citizen. In fact, the McHenry Road is named for the McHenry family, one of whose members married the late Judge Langdon, here. My familiarity is due to that fact.

Mr. Myers: Q. From your ranch this ranch is located how far? A. About 11 miles.

Q. How did it happen that your father and your brother were with you on this particular morning?

A. Well, I asked them to go along with me to get their approval.

Q. What were you going to do?

A. I was intending to stock it.

Q. What?

A. It was in Ladina clover, and I intended to stock it.

Q. You were about to stock this ranch?

A. Yes.

Q. Was that a new enterprise with you, or was it something you had done before? [32]

(Testimony of John Martin Souza.)

A. No; it was new to me.

Q. Do you know about what time it was you left your home?

A. It was shortly before nine.

Q. After you left home just tell us the way you used now to get down to the scene of this accident.

A. As I left my home I proceeded south on Toombs Road until I approached Beckwith; then I turned to my left, proceeded easterly on Beckwith Road until I approached the Southern Pacific crossing.

Q. About what time was it that the accident happened? A. Between 9:00 and 9:15.

Q. As you traveled these three miles on Beckwith Road before reaching the scene of this accident, tell what your maximum speed was that you traveled that morning.

A. Thirty-five or 40 miles an hour.

Q. Had you traveled that speed all the way up to the time the accident happened, or had you varied it?

A. As I approached the crossing I began slowing down.

Q. How far were you from the crossing when you started slowing down?

A. Between 100 and 200 feet.

Q. When you say you approached the crossing, what crossing are you referring to?

A. The crossing of Beckwith and the Southern Pacific.

(Testimony of John Martin Souza.)

Q. Southern Pacific tracks? [33] A. Yes.

Q. That is the crossing where this accident happened? A. That's right.

Q. As you approached the crossing there, is there anything at all on your right as you approach the crossing? What I mean, was there anything growing in the way, trees, or otherwise?

A. Well, there is a row of grape vines on my right.

Q. For what distance, do you know?

A. Well, it ends about 60 feet from the track.

Q. Where were you with reference to these grape vines when you started to slow your car down?

A. When I was about at the end of the grape vines I was going about 15 miles an hour.

Q. The end of the grape vines is about how far from the tracks, themselves, the railroad tracks?

A. Sixty feet, about.

Q. As you continued on 15 miles an hour, what did you do?

A. I began slowing up, I look to my right. There is a private road at the end of the grape vines.

Q. That private road, is that the road that leads to some ranch house? A. Yes.

Q. What was the next thing you did?

A. Well, I was slowing up until I got about 20 feet from the [34] track, and I stopped.

Q. When you stopped your car and you say you were 20 feet from the track, what portion of your automobile are you referring to, the front end, the back end, or middle of it?

(Testimony of John Martin Souza.)

A. It would be the front.

Q. The front end would still be 20 feet, that would be west, from the railroad tracks?

A. Right.

Q. Now, tell us what you did after that.

A. Well, first I looked to my right; then I looked to my left. I didn't see anything, so I shifted into low and I started off.

Q. Then what happened?

A. Well, when I was straddling the tracks I looked to my right again and there was an engine 50 or 75 feet away from me, and I didn't have time for anything else.

Q. How would you describe the front end of that engine with reference to color?

A. Well, the engine was silver in front.

Q. What kind of a morning was it, that is, with reference to climatic conditions, visibility and so forth?

A. Well, it was a cool morning. It was sort of a haze hanging low and I couldn't see any more than about 200 yards down the track, got no clear view.

Q. How about the sun, was it visible?

A. Yes, the sun was visible. [35]

Q. Where was it with reference to you?

A. Well, it was directly, just about directly east of me, maybe a little south.

Q. A little south of east? A. Right.

Q. How high in the sky was it, I mean with reference to your vision in the car?

A. It was at an angle.

Q. Were the rays showing directly upon the

(Testimony of John Martin Souza.)

top of your car, or was it directly ahead of you?

A. It was shining in the windshield, I could see it.

Q. This haze that you speak of, was that a haze that was something like a fog, or was it something lighter than fog, or—well, describe it.

A. It was lighter than fog, being sort of a haze.

Q. Was your vision affected with reference to the direction you looked? What I mean by that, was there any difference in looking toward the sun or away from the sun?

A. Well, it naturally would distort my vision.

Q. Looking in what direction?

A. When I looked right directly on the sun.

Q. When you looked to the left, how about that?

A. The sun wouldn't hinder me when I looked to my left.

Q. I show you some pictures here. Pardon me, I will show these pictures to counsel first. [36]

The Court: All right.

Mr. Myers: Q. I show you this photograph, Mr. Souza, and ask you what that is.

A. That is a picture of the crossing.

Q. Looking in what direction?

A. That is looking north.

Q. That is a fair representation of that crossing as it appeared on the morning of the accident?

A. Well, it is a little clearer, I think.

Q. It is clearer? A. Yes.

Q. As far as the surroundings are concerned, it is the same? A. Yes.

(Testimony of John Martin Souza.)

Mr. Myers: We will offer this photograph in evidence as Plaintiff's Exhibit No. 1.

(The document was marked Plaintiff's Exhibit 1 in evidence.)

Mr. Myers: Q. I show you this photograph. What is that a picture of?

A. That is another picture of the crossing.

Q. What direction are you looking in that photograph? A. Looking south.

Q. Looking south; that would be looking to your right as you approached the intersection?

A. That's right. [37]

Q. Is that a fair representation of the crossing as it appeared that morning, or is that also clearer?

A. This is clearer.

Q. As far as the physical characteristics are concerned, it is the same in the picture as it was that morning? A. Yes.

Mr. Myers: We will offer that in evidence as Plaintiff's Exhibit next in order.

(The photograph was marked Plaintiff's Exhibit 2 in evidence.)

Mr. Myers: Q. I show you this photograph and ask you what that is a picture of.

A. That is a picture of the private road just before the crossing.

Q. That is the private road that you spoke of at the end of the grape vines?

A. That's right.

Q. That is a fair representation of that, is it?

A. Yes.

(Testimony of John Martin Souza.)

Mr. Myers: We offer that in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted.

(The document was marked Plaintiffs' Exhibit 3 in evidence.)

Mr. Myers: Q. This photograph is a picture of what?

A. That is a picture of the grape vines before you get to the [38] crossing.

Q. Is that a fair representation of the appearance that morning that this accident happened?

A. Yes.

Mr. Myers: I offer that in evidence.

(The photograph was marked Plaintiffs' Exhibit 4 in evidence.)

Mr. Myers: Q. This last one is a picture of what? A. That is a picture of the crossing.

Q. Looking in what direction there?

A. Looking north.

Q. In other words, looking toward San Francisco? A. That's right.

Q. That is a fair representation of the crossing, is it? A. Yes.

Mr. Myers: We will offer that in evidence as Plaintiffs' Exhibit next in order.

(The photograph was marked Plaintiffs' Exhibit 5 in evidence.)

Mr. Myers: Your Honor, may we pass these pictures to the jury?

(Testimony of John Martin Souza.)

The Court: You know, I prefer that be done when you have concluded with the witness, unless you want to propound a question, otherwise we have to stop in the middle of—

Mr. Myers: Very well, your Honor. I just thought that after showing these pictures the jurors might understand the [39] rest of the description where this accident happened.

The Court: If you want to do it now it is all right. I was about to declare a recess. We will have a short recess and before you put the witness on again you may pass these to the jury before you propound other questions. Will it be stipulated the usual admonition has been given?

Mr. Myers: Yes.

Mr. Dunne: Your Honor please, we will stipulate on a running stipulation that it may be deemed given each time the Court adjourns for a recess, and also we will stipulate that the jury, all of the jurors are present unless counsel notes the absence of a juror.

The Court: I will tell you what we will do. Usually, as you know, I give the short admonition, but when we separate for the day I amplify it, but there is no use repeating it when we take a short recess. Step down. We will take a short recess.

(Recess.).

The Court: You may show the jury those pictures before you continue the examination of the witness.

(Testimony of John Martin Souza.)

Mr. Myers: Thank you, your Honor.

(The Exhibits 1, 2, 3, 4, and 5 were passed to the jury for their examination.)

The Court: Proceed now.

Mr. Myers: Q. When you stopped your automobile 20 feet [40] from the crossing, will you tell us whether or not you listened?

A. Yes, I did.

Q. What, if anything, did you hear?

A. I didn't hear anything.

Q. Will you tell us whether or not there was a whistle blowing or a bell ringing on this locomotive?

Mr. Dunne: Objected to as calling for a conclusion of the witness. He can say whether he did or did not hear.

The Court: On a question of hearing, unless we are dealing with a visible sign that he could see, the only way he could tell is what he heard. I think the question should be reframed.

Mr. Myers: Q. Mr. Souza, first, is there anything wrong with your hearing?

A. No, there is not.

Q. On this particular morning immediately prior to the time the accident happened, while your car was stopped at this crossing, will you tell us whether or not there was any bell ringing?

Mr. Dunne: Same objection. He can state whether he heard one, or not.

The Court: Unless a bell is visible, the instrument, itself, is visible, he can't testify whether it

(Testimony of John Martin Souza.)

was ringing or not. He can testify whether he heard it ringing or not.

Mr. Myers: I think, your Honor, that that is a matter of common knowledge, whether a bell is ringing. It does not— [41]

The Court: No, that is not necessarily so. He may have been so inattentive that the bell may have been ringing without his hearing it. He cannot be asked whether it was ringing. He can testify what he saw. If you are asking him about a bell ask him whether he saw the locomotive, and whether he saw the bell, and whether he heard the bell.

Mr. Myers: That would be impossible, to see it, I think, under those circumstances.

The Court: That is true. Then it would be a conclusion. All he can testify is whether he heard it. Unless a thing is visible to the eye, you see; then if it is discernible by another sound, such as the sound of ringing, then the inquiry should be limited to that.

Mr. Myers: Q. First, Mr. Souza, was the window on your side of the car open, or was it closed?

A. It was open.

Q. How about the window on the other side of the car, was it open, or closed, that is, the right-hand side? A. It was closed.

Q. Tell us whether you heard any bell ringing, or whistle blowing immediately prior to the time the accident happened.

A. No, I did not hear anything.

Q. When you looked up and saw the locomotive

(Testimony of John Martin Souza.)

50 to 75 feet away from you, did you hear anything then? A. No, I couldn't hear anything.

Q. Could you say whether the engine was working steam, or not?

A. I couldn't tell; it was too quick.

Q. While you were at a standstill; in other words, while your car was stopped 20 feet from the tracks, I believe you said you looked to your right. About how long did you spend in looking to the right; just how much time elapsed while you were looking to the right?

A. About two seconds.

Q. I believe you stated you then looked to the left. About how much time elapsed while you looked to the left?

A. About another two seconds.

Q. When you started up to go onto the crossing, you started up, I think you stated, in low gear.

A. That's right.

Q. About how far was your car—I mean how fast was your car moving then while it proceeded from that point 20 feet from the crossing up onto the tracks?

A. About three or four miles an hour.

Q. Then it was after that the collision took place; is that right?

A. I went three or four miles an hour until I reached the tracks, yes.

Q. Then what happened?

A. Then the collision occurred.

Q. Then what? [43]

A. The collision occurred.

(Testimony of John Martin Souza.)

Q. What part of your car was struck; right in the middle, or the back, or the front, or what?

A. Well, it was just in front of the back wheel.

Q. What happened to you then?

A. I was knocked unconscious.

Q. Do you know what happened to the occupants of your car?

A. Well, I learned that my father was killed.

Q. After you regained consciousness tell us, where were you when you regained consciousness?

A. I was lying on the ground.

Q. Where?

A. East of the railroad tracks on the north of Beckwith Road.

Q. Where would that be with reference to the ordinary crossing sign located on that side of the crossing?

A. It would be south of the—you mean the cross arms?

Q. Right.

A. It would be south of the cross arms. The cross arms was knocked down on that side.

Q. When you regained consciousness and you were in that position, did you notice the position of the other occupants of your car?

A. Yes; they were lying on the ground near me.

Q. Was anyone else present there at that time?

A. Yes, there was. [44]

Q. Do you know who was there?

A. Well, there was a crowd of people.

Q. Was there any motorcycle or highway patrol officer there? A. Yes, there was.

(Testimony of John Martin Souza.)

Q. Then where were you taken?

A. I was taken to the Emergency Hospital.

Q. Was anyone taken to the Emergency Hospital with you?

A. No. I was taken by myself in one ambulance.

Q. How about your brother Edward?

A. He was taken also in another ambulance.

Q. Into the hospital? A. Yes.

Q. You say your father was killed in the accident. You learned that when you regained consciousness? A. Yes.

Q. Your brother, what happened to him?

A. He died two days later.

Q. What injury did you receive in the accident?

A. I received a concussion, which I suffered three or four weeks, and cuts on the right hand.

Q. Cuts on your right hand? A. Yes.

Q. They healed up all right? A. Yes, sir.

Q. Anything else? [45] A. No, sir.

Q. Your nerves have been all right, have they?

A. What?

Q. Your nerves, were they all right?

A. Well, not for about three or four weeks; I suffered shock.

Q. What kind of work were you doing immediately prior to the time the accident happened?

A. I was helping my dad.

Q. What kind of work?

A. Dairy farming.

Q. Then within three or four weeks did you go back to that kind of work again? A. Yes.

(Testimony of John Martin Souza.)

Q. Your automobile was demolished — I will withdraw that. Your automobile was struck by this engine. Was the damage minor, or was it a total loss, or what was it? A. It was a total loss.

Q. How much were you damaged as a result of your automobile damage, what amount of money?

A. \$650.

Q. Do you remember seeing either the engineer or the fireman after the accident that happened?

A. No, sir.

Q. Did you ever see the engineer or fireman after that time? A. I did not. [46]

Q. Not to this day? A. No, sir.

Q. Did you see the engine for a sufficient length of time, a sufficient distance to form any estimate as to the speed it was traveling at the time of the accident? A. No, sir.

Mr. Myers: You may cross-examine.

Cross-Examination

Mr. Dunne: Q. Mr. Souza, I assume that you went to high school? A. Yes.

Q. Had you completed high school at the time of this accident? A. No, I hadn't.

Q. What work, if any, up to the time of this accident, had you done?

A. I had just helped my father on the dairy farm.

Q. That was, I suppose, in the afternoon of school days?

A. Well, I helped him after school, yes.

Q. After school, and, I suppose, on weekends?

(Testimony of John Martin Souza.)

A. Yes.

Q. And during the summer? A. Yes.

Q. What day of the week did this accident happen on?

A. I don't recall. I know it was on October 11.

Q. That was Thursday, was it not? [47]

A. I am not sure.

Q. Do you recall whether or not it was a school day? A. No, I don't.

Q. Do you recall whether or not you had not gone to school on that particular day because you were going to look at a ranch?

A. No. I wasn't going to school at the time.

Q. I thought—I may have misunderstood you—I thought you said at the time of the accident you had not finished school.

A. I hadn't finished school. I didn't finish high school.

Q. You did not finish high school. When was it you stopped going to high school?

A. I stopped going to high school in 1943.

Q. You stopped going to high school in 1943. From 1943 to 1945 had you been working?

A. Yes, I had.

Q. And working with your father on his dairy ranch; is that correct? A. Right.

Q. Did he pay you wages for that?

A. Yes; he paid me a slight amount.

Q. Slight amount. Of course, you lived at home?

A. Yes.

Q. When was it that you got this automobile?

(Testimony of John Martin Souza.)

A. I got it about seven months before the accident, on March 3rd.

Q. Had you driven it from March up to the time of this accident? [48]

A. Yes, I had driven it.

Q. Had you driven it in to Modesto?

A. Yes.

Q. Had you driven it along Beckwith Road toward this crossing? A. Yes, sir.

Q. And over this crossing? A. Yes, sir.

Q. A great many times?

A. Quite a few times.

Q. About how often a week would you go down Beckwith Road and over this crossing?

A. About three times a week.

Q. Then you knew where the crossing was?

A. Yes, I did.

Q. You knew about how far it was from where Toombs Road turned into Beckwith crossing; is that correct? A. Yes.

Q. You had no operator's license, did you?

A. No, I did not.

Q. Did you make an application for an instruction permit in March when you got the automobile?

A. No, I did not.

Q. Did you ever make such an application?

A. Yes, I did.

Q. When did you make it? [49]

A. It was when I was about 17.

Q. That was the only one you ever made?

A. That's right.

Q. So at the time of this accident you had

(Testimony of John Martin Souza.)

neither an operator's license nor a running permit, did you?

A. I don't think my permit was still in—

Q. No. Those are good only for 90 days, aren't they?

A. That's right.

Q. Did your brother know that, your brother Edward?

A. Yes, he did.

Q. When was it that you first became interested in taking over or doing something to another ranch, or dairy?

A. About six months before the accident.

Q. Was that this same ranch or dairy that you were going to see on this day?

A. Well, I didn't know anything about it six months before.

Q. You were going to a particular ranch or dairy on the day of this accident, were you not?

A. That's right.

Q. So we can define it, did it have a name?

A. I don't know if it did or did not.

Q. Was it at the so-called Dry Creek—

A. It was somewhere near there.

Q. I don't say that this is the right name of this particular ranch, but let's just say we can call it that in order to know [50] we are talking about this particular one, let's call it the Dry Creek Ranch. When did you first become interested—

The Court: Dry Creek is a dry creek that runs through a lot of ranches.

Mr. Dunne: I am just using that name.

The Court: It is a dry creek.

(Testimony of John Martin Souza.)

Mr. Dunne: Is there any way we can identify this ranch? Who owned this property?

A. I don't know.

Q. You don't know whether it had a name?

A. I don't know.

The Court: Well, I may inform you that those places, those ranches up there, small ranches because of the intensive agriculture that goes on, and in the olden days they had names. Now they are not named, unless you have a large place. What they call a ranch does not exceed 20 to 40 acres. It is not like in Southern California, where the ranches run into thousands of acres.

Mr. Dunne: Just so we won't confuse this ranch or dairy which your father owned then, the one to which you were going I will call the Dry Creek Ranch. When had you first become interested in that?

A. I just read an advertisement in the paper on the night before.

Q. The night before. What was it that you had in mind to do with it, operate it as a dairy, or what were you going to do? [51]

A. I wanted to stock it with beef.

Q. That would be beef for slaughtering and sale in the butcher shops? A. Right.

Q. Had you discussed that with your father the night before? A. Yes. [51-a]

Q. And had you discussed it with your brother Edward the night before?

A. I don't recall if I had or not.

(Testimony of John Martin Souza.)

Q. You did not have the money, of course, to buy the beef, did you?

A. No, I didn't have enough.

Q. Was your father going to assist you in that?

Mr. Myers: I am sorry, Mr. Dunne, I can't hear you.

Mr. Dunne: I will stand over here. Maybe we can do better.

The Court: Unless you examine him as to a document, it is better to stand over there.

Mr. Myers: Mr. Reporter, will you read that last question?

(Record read.)

The Witness: Well, I had a few head of stock and I meant to start out with those.

Mr. Dunne: Q. Was your father going to give you his help? A. Well, maybe later on.

Q. At that time what was the business, if anything, or occupation of your brother Edward?

A. He was operating a hay press.

Q. Where was he operating that?

A. Well, right in that vicinity.

Q. Did he have the hay press that he would go around and press [52] hay for anybody who wanted it done? A. Yes, he did custom pressing.

Q. He would go around from place to place?

A. That is right.

Q. He was not operating any ranch of his own?

A. Well, he had a ranch, yes, he did.

Q. Where was this ranch?

A. His ranch was on the road called Dunn Road, which was north.

(Testimony of John Martin Souza.)

Q. You were about to say it was north of some place? A. It was north of my father's place.

Q. What kind of ranch was that?

A. It was an alfalfa ranch.

Q. Did he run any stock on that?

A. No, he did not.

Q. When did you first discuss with your brother Edward going down to see this ranch?

A. The morning of the accident.

Q. Will you tell us as near as you can remember it what the conversation was that you had with your brother?

A. Well, I can't recall too well. It has been quite a while.

Q. I know, we do not expect you to remember it word by word. We know that that could not be done. But tell me as best you can the substance of what that conversation was with your brother. [53]

A. Well, we were discussing the different markets and how they would be for beef and the possibilities of how many stock the ranch could hold, how good the clover was on the ranch.

Q. Anything else that was said?

A. I don't recall—rent, the amount of money it would take to operate the ranch.

Q. You talked that over with your brother?

A. Yes, sir.

Q. Did you ask him to go down there with you?

A. Yes, I did.

Q. What did you say about that?

A. What did I say about it?

(Testimony of John Martin Souza.)

Q. Yes, what did you say to your brother about going down there with you?

A. Well, I asked him if he would like to come along.

Q. Did you say anything else to him?

A. I don't remember if I did or not.

Q. Did you say you would like to come along to look it over so you could have his opinion on what he thought about it?

A. Yes, sir.

Q. And did he agree to do that?

A. Yes, he said he would.

Q. Did you talk to him about his helping you out, putting any cattle on that ranch? [54]

A. No, I did not.

Q. Did you talk to him anything about what he was going to do on that ranch?

A. No, I did not.

Q. Did you talk to him about any assistance that he might give you with his hay press or any other way?

A. No, I didn't expect him to give any help with the hay press because there wasn't any hay on this ranch.

Q. Can you remember anything else about that conversation that you had with your brother?

A. No, I can't.

Q. As I understand it, you left your father's home somewhere before 9:00 o'clock on the morning of this accident, is that correct?

A. That is right.

Q. Mr. Souza, before I show you these pictures,

(Testimony of John Martin Souza.)

just one other question so I will be clear about it: On this particular trip, the objection of this trip was to look over a ranch that you were contemplating renting, is that correct?

A. That is correct.

Q. And you took your father and brother along with you so they could look it over with you and you could have their advice?

A. That is right.

Q. I am going to show you here some pictures, one at a time, and you will notice that I put some ink notations at the [55] bottom of it in each instance, the date. They are supposed to have been taken on the day of the accident in the afternoon, and the distance that the camera was from various points, and I will point that out to you, and the direction in which the camera was facing. I want to show you this one and ask you if you recognize that.

A. Yes, I do.

Q. That one, Mr. Souza, if I may step up here by this diagram, is taken looking down Beckwith Road toward the railroad track, is it not?

A. That is right.

Q. And it shows on the righthand side a railroad warning sign, does it not?

A. That is right.

Q. Do you recognize that sign as being there at the time of the accident?

A. I don't recall if it was there or not at the time of the accident.

Q. Did you see it the morning of the accident?

A. I might have seen it. I don't recall if I did or not.

(Testimony of John Martin Souza.)

Mr. Dunne: I will offer this as our first exhibit in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit A.)

Mr. Dunne: Q. What was it that first attracted your [56] attention, brought it to your attention that you were approaching, that you were getting into the neighborhood of the railroad track?

A. I could see the railroad track from about 100 feet or 200 feet back.

Q. Could you see the white cross arms?

A. I don't recall if I could or not.

Q. There were two of them there before the accident, were there not?

A. I think there were.

Q. Do you recall seeing either of them at any time before the accident?

A. I don't recall if I did or not.

Q. Do you know whether or not you were as far back as this advanced highway sign at the time you first saw the crossing? Take the picture so you can see what I am talking about.

A. No, but I knew the railroad was there. I didn't have to see it.

Q. See if you can answer my question. Were you that far back when you first saw the railroad?

A. I don't think I could see it from this far away.

Q. Can you tell me by any physical objects on

(Testimony of John Martin Souza.)

the ground where you were at the time you first saw the railroad?

A. About 75 or 100 feet from the track I could see the tracks.

Q. I am asking you if you can tell me by reference to any [57] physical objects on the ground whether it is a fence or a building or a telephone pole or a house where you were when you first saw the track?

A. There was a row of grape vines on the right.

Q. You could see over those, couldn't you?

A. Well, they are pretty high.

Q. Answer my question: You could see over those, couldn't you?

A. I am not sure if I could or not. They were clipped shortly after the accident.

Q. Let me show you another photograph and ask you if this is a correct photograph looking down Beckwith Road the way you were going toward the crossing for about 300 feet from the crossing.

A. You say this is 300 feet from the crossing?

Q. Yes, the camera was 300 feet from the crossing.

A. I could see the cross arms from here. It shows it in the picture.

Q. Could you see it on the morning of the accident from there? A. Yes, I think I could.

Mr. Dunne: We will offer this in evidence as our next exhibit in order.

The Court: It may be received.

(Testimony of John Martin Souza.)

(The photograph in question was thereupon received in evidence as Defendant's Exhibit B.) [58]

Mr. Dunne: Q. I will show you another one taken 300 feet from the crossing, and looking now not straight down the road, but looking a little bit to the right in the way you were going, which would be down toward Modesto, down toward the south, and ask you if that is the way conditions were on the morning of the accident.

A. I don't believe this shows any mist or haze.

Q. We will come to that. Let us take the physical objects so far as road, poles—

A. They were the same.

Q. I am going to call your attention to one particular thing. I have my finger just to the side of an object which shows beyond a tree. Can you tell me what that is? A. No, I can't.

Mr. Dunne: I will offer this as our next exhibit in order.

Mr. Myers: What was the answer?

Mr. Dunne: "No, I can't."

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

Mr. Myers: For the purpose of the record, what were you referring to?

Mr. Dunne: I was referring to the edge of the Valley Brew sign.

Q. I will show you two photographs, the first

(Testimony of John Martin Souza.)

one looking [59] right down the road, and the camera in that one was 200 feet from the track. Do you recognize that as showing the physical objects that were there? A. Yes, sir.

Q. You will see across the track and what looks to be across the highway, a building. What building was that? A. A gas station.

Q. Did you ever see the gas station on the morning of this accident?

A. I don't recall if I did or not.

Mr. Dunne: I will ask this be marked as our next exhibit in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit D.)

Mr. Dunne: Q. This one, the camera was 200 feet from the track, but to the lefthand side of the road, in the direction that you were going and again looking off southeast a little bit off to the right from where you were going, and ask you if that shows physical objects which were there.

A. Yes, sir.

Q. Do you see a sign off in the distance in that picture? A. Yes, sir.

Q. What sign is that?

A. It is a sign on the road, Valley Brew sign.

Q. An advertising sign, a billboard sign? [60]

A. Yes.

Q. Did you see that on the morning of the accident?

A. I don't believe I looked at the sign. I just looked down the track.

(Testimony of John Martin Souza.)

Mr. Dunne: I am going to ask that this be marked as our next exhibit.

The Court: It may be received.

(The photograph in question was thereupon received in evidence and marked Defendant's Exhibit E.)

Mr. Dunne: Q. And another one looking in the same general direction but this time beginning 125 feet from the tracks. Does that correctly show the physical objects, the poles, trees, vines, Valley Brew sign, and other things of that sort?

A. Yes, it does.

Mr. Dunne: We will offer this in evidence as our next exhibit.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit F.)

Mr. Dunne: Q. I am going to show you another one purporting to be taken with a camera at 75 feet from the railroad track looking down Beckwith Road and ask you if that correctly represents the physical objects that were there with one exception: the cross arm sign on the far side of the track.

A. Yes.

Q. Before the accident there were two cross arm signs, were [61] there not? A. Yes, sir.

Mr. Dunne: We will ask that this be marked as our next exhibit.

(Testimony of John Martin Souza.)

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit G.)

Mr. Dunne: Q. And another one taken from the same point, 75 feet back from the track, looking down now along the track: Does that correctly show the physical objects with the exception of a train which is shown in the distance in that picture? With that exception does it show the physical conditions on the morning of the accident?

A. It shows the physical conditions, yes.

Q. How about that train? Could you see a train that far away?

Mr. Myers: When, counsel?

Mr. Dunne: The morning of the accident.

Mr. Myers: That is objected to, your Honor, unless the distance is specified as to how far the train is from the crossing.

Mr. Dunne: I do not know. That is the reason I want to ask the witness, if he could see a train in that locality.

Mr. Myers: It is impossible to tell from a photograph, counsel. You know that.

The Court: The inquiry is addressed to the witness. He is asking him. [62]

The Witness: I don't know if I could tell or not. I don't know how far the train is.

The Court: That is the answer.

Mr. Dunne: I offer this as our next exhibit in order.

(Testimony of John Martin Souza.)

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit H.)

Mr. Dunne: Q. This next one shows the same thing, does it not, with the train closer to the crossing? A. Yes, it does.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit I.)

Mr. Dunne: Counsel, I won't put that in unless you want it. I do not think it helps anything.

Mr. Myers: It is your picture.

Mr. Dunne: You can have it if you want it. I do not think it aids anything.

May I, Mr. Clerk, see the plaintiff's exhibits? I do not want to duplicate them unnecessarily.

Q. I show you one more, which is like two of those which counsel showed you, with the exception that they are taken a little farther back, and ask you if that correctly represents a view down the railroad track looking in the direction in which the train is coming, with the exception that one cross arm sign has been knocked down.

A. The train was not coming from that direction. That is [63] looking north.

Q. That is right. The train was going north, wasn't it? A. It was going north, yes.

Q. So that is looking in the same direction the train is going? A. That is right.

Q. The way people looking ahead on the engine

(Testimony of John Martin Souza.)

or the train would look? A. That is right.

Mr. Dunne: I will offer that as our next exhibit.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit J.)

Mr. Dunne: Q. As you left home that morning, how far was it from the place where Toombs Road turns into Beckwith Road?

A. I don't know the exact distance. Between 1/8 and a quarter of a mile.

Q. How fast did you drive down that?

A. Not very fast, about 30 miles an hour.

Q. And then you turned left into Beckwith Road? A. That is right.

Q. About three miles from the railroad track, is that correct? A. That is right.

Q. Is Beckwith Road straight down to the railroad track? A. Yes, it is.

Q. A two-line highway with lanes marked, with a divided mark [64] in the middle?

A. That is right.

Q. As you went down Beckwith Road toward the railroad track, how fast were you traveling?

A. About 35 or 40 miles an hour.

Q. What were you and your brother and father doing as you drove along Beckwith Road after you turned in from Toombs Road?

A. We discussed this ranch for a short time.

Q. When did that discussion cease?

(Testimony of John Martin Souza.)

A. About a half mile or a mile before we got to the tracks.

Q. How do you fix that distance at a half mile or a mile?

A. What do you mean, how do I fix that distance?

Q. How did you know you were a half mile or a mile from the tracks when that conversation ceased?

Mr. Myers: That is argumentative.

The Court: It is permissible. It is cross-examination.

The Witness: Well, it was a few minutes before the accident, about five minutes.

Mr. Dunne: Q. About five minutes?

A. Probably less. I am not sure.

Q. What is your best estimate of that time?

A. I don't know. Between three and five minutes, maybe less.

Q. You think it took you from three to five minutes, at 40 miles an hour to travel from a half mile to a mile?

A. It would take less, naturally. [65]

Q. What now is your best estimate or have you any recollection? Mr. Souza, if you do not have any recollection, don't hesitate to say so.

A. No, I don't know for sure.

Q. Do you have any clear recollection of how far you were from the crossing at that time?

A. You mean when we ceased talking?

Q. Yes.

(Testimony of John Martin Souza.)

A. I knew we were quite a ways back because we didn't talk at all, very little, from the time we left.

Q. You spoke of a fence that was on your right where grape vines were growing. How far back from the track along Beckwith Road does that fence with those vines over it extend?

A. It runs back two or three hundred feet, maybe more. I don't know.

Q. What?

A. Maybe more. I don't know for sure.

Q. What is your best estimate of that?

A. Around 300 feet.

Q. I show you this picture, Defendant's Exhibit

A. That seems to indicate that it ends, and that there is a road off toward the right just before that crossing sign.

A. That is right.

Q. Does it extend farther back from the railroad tracks than that or is that the place where it ends?

A. That is where it ends.

Mr. Myers: What is that distance, counsel?

Mr. Dunne: 600 feet.

Q. And your estimate of that is two to three hundred feet, is that correct?

A. I wasn't sure. I just guessed at it.

Q. I know, but I want your estimate of distance. Your estimate of that distance was two to three hundred feet?

A. That is what I guessed it at, yes.

Q. You gave us some other distances here on direct examination. Are they just guesses or are

(Testimony of John Martin Souza.)

they estimates, the same as this one, or guesses the same as this one?

Mr. Myers: Your Honor, that is not proper cross-examination. The witness has estimated, given his best judgment as to distance, and I do not think it is fair to ask him a question such as that.

The Court: I wouldn't use that word "guess". I think the form of the question is objectionable.

Mr. Dunne: I used it only because the witness used it, your Honor.

The Court: I think it should be reworded asking him if he is certain or if it is merely an estimate.

Mr. Dunne: Q. These other distances that you gave, are they merely estimates?

A. Most of them are estimates, yes. [67]

Q. Let me ask you this. Will you estimate for me, your best estimate now, the distance that the Valley Brew sign is from Beckwith Road at the crossing?

Mr. Myers: Just a minute, your Honor, before the witness answers that question.

Mr. Dunne: It shows in Defendant's Exhibit B. [68]

Mr. Myers: That is objected to as incompetent, irrelevant and immaterial. I don't know what a sign has to do with this question. It is a sign sitting there in the field away from the crossing.

Mr. Dunne: I want to test the witness' capacity to estimate distances.

Mr. Myers: He may not have paid any attention to that sign. There is no reason why he should pay attention to that sign.

(Testimony of John Martin Souza.)

The Court: You know, Mr. Myers, it is very important to exchange—I address both counsel, I think you should desist in engaging in the side comments. Kindly address your objections to the Court and I will rule on them. When you are talking to each other I don't know what you are doing, whether you are just exchanging views, or whether you are asking me to rule on something.

Mr. Myers: Your Honor, I am sorry; that is true. With reference to this last question that was asked on Defendant's Exhibit F, that is objected to on the ground it has nothing to do with the happening of this accident. He is asking this witness to estimate the distance of that sign that is located back of the crossing out in a field, and that has nothing to do with the accident, at all.

The Court: I think the conduct of this witness, who was the driver of the car, at or about—the attention, the observation, [69] what he was doing, whether he was watching the road, whether he was talking to someone is all a proper subject of inquiry for the purpose of his alertness, whether he has his mind on the wheel, or the road, or whether he was talking to somebody else, and what he saw or did not see.

Mr. Myers: That is just the point. Looking at a sign out in the field away from where he is going would show that he was not alert, that he was not looking where he was driving. That is the point. There was no evidence he even saw the sign on the morning of the accident.

The Court: He is not required to take the

(Testimony of John Martin Souza.)

witness' statement on that. He is not his witness. He has a right to test the verity of his statements, by asking him things which might detract from his statement.

Mr. Myers: Your Honor, I agree with your Honor, but my point is there is no evidence yet that this witness saw this sign, at all, and he is asking—he is predicating his question on that ground.

The Court: Mr. Myers, you know I seek to avoid any statement in the course of the trial which might lead the jury to infer that I expressed an opinion as to the facts. You have tried at least one case before me, and Mr. Dunne has tried several, and other members of your firm have tried many of them before me, both here and in my own district, both the Northern District and Southern District, and you know [70] I try to avoid making any comment that might lead the jury to believe I expressed an opinion as to the facts. I could give you a perfect answer to your statement, but I don't choose to. I merely say whether he saw it or not is a proper subject of inquiry. Suppose he did not see it? It is a subject of argument whether if he had looked he would have seen it.

Mr. Myers: Well, will your Honor look at the exhibit?

The Court: No, I am not going to do that.

Mr. Myers: I will submit the matter.

The Court: The witness knows the crossing better than we do. He was there.

Mr. Myers: That is not the crossing—

(Testimony of John Martin Souza.)

The Court: It is at or about. You are not limited to the locale of the crossing. I want to assure you this is not the first crossing case I tried. I think it is the eleventh or twelfth that I have tried in the last few years. The last one I tried was in Fresno in March of this year, so I have some familiarity with the rules which apply to the scope of inquiry. All I am saying is this, that the defendant has a right to examine the witness as to all the objects which are around and about the crossing within a reasonable distance, before or after or around it on that morning, and it was not dark, although you said in your opening statement it was hazy. Well, there has been no evidence, so anything that was visible [71] or about, at or near the crossing is a subject of inquiry.

Mr. Myers: Your Honor, I am sorry, but this witness has testified already that it was hazy that morning, that there was a ground haze. That was on direct examination.

The Court: All right.

Mr. Myers: I am sorry, but that was it.

The Court: That may have slipped. All right. Then he has a right to find out how hazy it was, whether he could see things.

Mr. Myers: Very well.

The Court: Let's find out.

Mr. Dunne: I think I can recall the question.

Q. What is the best estimate of the distance the Valley Brew sign is from the crossing of Beck-with Road and the railroad track?

(Testimony of John Martin Souza.)

A. Somewhere in the vicinity of 600 feet, I would estimate.

Q. That is your best estimate. As you drove down Beckwith Road toward the crossing, was there any traffic on Highway 99?

A. I don't recall.

Q. As you drove down Beckwith Road toward the crossing at any time before the accident was anybody over at the service station?

A. I don't recall that.

Q. Did you look?

A. I did not look at the service station, no. [72]

Q. As you drove up Beckwith Road, how far from the railroad track were you when you first slowed down from 40 miles an hour, or whatever the speed was that you had been traveling?

A. I would say about, around 200 or 300 feet; maybe less. That is my estimate.

Q. Did you use the brake in slowing down?

A. No. I just took my foot off the accelerator.

Q. At what speed were you going at the time you passed beyond the grape vine hedge to your right?

A. About 10 or 15 miles an hour.

Q. Was there any traffic ahead of you on the Beckwith Road?

A. No, there was not.

Q. As far as you know, was there any traffic behind you?

A. I don't know.

Q. Was there any traffic after you were within 200 feet of the railroad tracks, was there any traffic on Beckwith Road going in the other direction?

A. I don't recall; I don't think there was.

(Testimony of John Martin Souza.)

Q. Did you have a radio in that car?

A. Yes, I have.

Q. Was it on or not? A. No, it was off.

Q. At no time until you got on the railroad tracks did you see any train or locomotive; that is correct, isn't it?

A. Not until I got on the track did I see it. [73]

Q. You got on the tracks. What position was your automobile on the tracks when you first saw the railroad locomotive?

A. Well, I was straddling, almost straddling the tracks.

Q. Is it fair to say that the center of your car was about over the center of the tracks?

A. No, I wouldn't. I would say it was just a little over, more toward the front than the center.

Q. You then looked and for the first time saw that railroad locomotive? A. Right.

Mr. Dunne: Did your Honor indicate you wanted to adjourn?

The Court: Well, I wanted to reach—you know, I usually don't look at the clock, but many of these jurors live across the bay.

Mr. Dunne: Yes, your Honor.

The Court: And I try, if I work long hours I try to do it at noon rather than in the afternoon. I was trying to find a stopping point.

Mr. Dunne: I can suspend now.

The Court: If it is all right. I know you probably cannot finish with the cross-examination.

Mr. Dunne: I cannot.

(Testimony of John Martin Souza.)

The Court: As you know, ordinarily I don't like to break the continuity of an examination or cross-examination, because many times it is in the interest of the proper presentation [74] of the case to continue with the examination and not to break it off, especially when we adjourn until the following morning. I may say that after 21 years as a judge I still am not a whistle man, but I am taking into consideration all the circumstances of the case, and your needs, and if I run over it is merely because I feel that the particular situation requires it. As long as we cannot finish with this witness there is no use to disorganize your plans and your transportation methods by running over, because this case will take several days.

Step down, Mr. Souza.

Ladies and gentlemen, we are about to take an adjournment until tomorrow morning at ten o'clock. The court instructs you not to converse among yourselves, or with anyone else on any subject connected with this trial, or to form or express an opinion thereon until the case is finally submitted to you. You are just hearing the first witness giving his version of the accident. You may gather from the statements of counsel that there probably will be contradictions in the testimony as to what exactly took place at the crossing. It will be up to you to determine the facts in the case, as I informed you when you were examined, and it is very important that you keep an open mind until you have heard all the testimony relating to the particular incident, and much more important until

you have heard the instructions [75] on the law to be given you by the judge of this court, and, incidentally, if you have been wondering what I was doing here, well, I am working on the instructions to be given to you when the testimony is concluded, and until you have those you won't have the touchstone upon which to assay the facts; so keep your minds open as to anything you hear until all the evidence is in and the case is submitted to you. When you come in the morning you go into the jury room and remain there until we call you.

(The trial was then adjourned until tomorrow, Wednesday, July 21, 1948, at ten o'clock a.m.) [76]

Wednesday, July 21, 1948, 10:00 o'Clock A.M.

The Clerk: The case of Souza vs. Southern Pacific Company, on trial.

Mr. Myers: Ready.

The Court: Proceed.

JOHN MARTIN SOUZA,
recalled, and having been previously sworn, testified as follows:

Cross-Examination——(Resumed)

By Mr. Dunne:

Q. Mr. Souza, your automobile was a 1941 Ford coupe? A. That's right.

Q. Was it a big Ford or a little Ford?

A. It was an 8.

Q. An 8. How many seats did it have?

A. One seat.

(Testimony of John Martin Souza.)

Q. One seat? A. That's right.

Q. That was the seat that the driver sat on?

A. That's right.

Q. Did it have any short seat in back of it?

A. No.

Q. Then the seat backed right up against the back of the car? [77]

A. Well, there was a small space in back of the seat, between that and the rear window.

Q. Did that go down to the floor where you could put bags? A. No.

Q. Just a shelf? A. That's right.

Q. Did it have a divided windshield?

A. Yes.

Q. How did the doors open, were they hinged to the front of the seat, or the windshield, or in back?

A. At the front.

Q. Then over on the right-hand corner where the door hinged there was a post, was there not?

A. Yes, there was.

Q. And right over at that angle, looking there, there was a blind spot when you were driving, wasn't there?

A. At times it would be.

Q. You were in the front seat behind the wheel?

A. That's right.

Q. At the time of the accident, and your brother was in that same seat next to you?

A. That's right.

Q. And your father, then, was in that same seat to your brother's right? A. That's right. [78]

(Testimony of John Martin Souza.)

Q. You told us yesterday, and I will ask you if it is correct, that your automobile was over the rails of the track straddling the track, when you first saw the locomotive.

A. When I first saw it, I would say the front wheels were over, getting over the tracks.

Q. What part of the locomotive did you see at that time?

A. I just seen the front end of it.

Q. After you stopped and started again, were you looking ahead in the direction in which you were driving?

A. After I started, yes, I was looking ahead.

Q. Did you, up until the time that the locomotive struck the automobile, ever hear the locomotive?

A. No, I did not.

Q. Did you hear any whistle?

A. No, I didn't hear a whistle.

Q. Did you hear any bell?

A. No, I didn't hear a bell.

Q. Did you hear any other noise from it?

A. No, I did not.

Q. Did you hear any rumbling of the wheels?

A. No, I didn't hear anything.

Q. Did you hear any rumbling of rails?

A. No, I didn't.

Q. You heard no sound at all?

A. No, I didn't hear any sound of the train.

Q. When you were stopped 20 feet from the track and looked to your right, did you look through the side window, or through the windshield?

A. I don't remember.

(Testimony of John Martin Souza.)

Q. When you were astraddle of the track and looked at the locomotive, did you look through the windshield, or through the side window?

A. Through the side window.

Q. What made you look to your right through the side window?

A. I don't know.

Q. It is possible that it was some noise from the locomotive?

A. It might have been, I don't know.

Q. Is it possible it was a whistle from the locomotive? A. I don't think so.

Q. But you are not sure?

A. No, I am not sure.

Q. As you were approaching the crossing before you had come to a stop did you look to your left?

A. When I was stopped I looked to my left, yes.

Q. When you looked to your left, were you able to see down the railroad track to your left?

A. Yes, I was.

Q. How far?

A. I would say about 200 yards. [80]

Q. To your left? A. That's right.

Q. The same distance to your right?

A. That's right.

Q. Had you done any work at your father's dairy on this morning before you left?

A. Yes, I had.

Q. What had you done?

A. I had helped him milk the cows.

(Testimony of John Martin Souza.)

Q. At about what time had you started in at that work? A. About 5:30.

Q. Was it dark at that time?

A. I don't remember if it was, or not.

Q. What time did it get light, do you remember?

A. I don't remember.

Q. Can you give us any idea, at all?

A. It might have got light, maybe at 5:30 or 6.

Q. That is your best recollection now?

A. That's right.

Q. You told us when you stopped you could see to your left 200 yards and you could see to your right 200 yards. Upon what do you fix that estimate? A. You mean the distance in feet?

Q. Yes. You said you could see to the left 200 yards and to the right 200 yards. Upon what do you fix that distance? [81]

A. 200 yards is 600 feet.

Q. Yes, that's right. Did you fix that by any objects? A. No, I didn't.

Q. Then how did you fix that distance?

A. I just guessed it. That is just an estimation.

Q. That is an estimation. Did you estimate it by objects that you could see?

A. No, I did not.

Q. When you were there, stopped, and looking down the railroad track to your right, tell us what you saw.

A. I didn't see anything; I just seen the rails.

Q. Is that all? A. That is all.

Q. See any poles?

A. I didn't look for any poles.

(Testimony of John Martin Souza.)

Q. See any trees?

A. Naturally, there are trees in.

Q. You say—the reporter didn't get the entire answer.

A. If there was trees probably in my vision somewhere, but they just didn't focus.

Q. Was there anything else tha focused when you looked to the right? A. No.

Q. Did you notice the Valley Brew sign?

A. No, I did not. [82]

Q. Did you notice the fences?

A. I didn't notice them.

Q. Did you notice anything at all of any kind or character other than the rails of the track?

A. No, I don't remember noticing anything.

Q. At that time you looked to the right, and then you swung your vision around and looked to the left?

A. That's right, when I was stopped.

Q. When you were stopped, that is what I am talking about. Do you recall anything that you saw at that time when you looked to your left?

A. Just the rails, and there is an orchard on the right that I could see.

Q. Well, you are mistaken by saying an orchard on the right. You mean the left, don't you?

A. Yes.

Q. There is a walnut orchard to the left?

A. Yes.

Q. When you looked ahead, do you remember anything that you saw at that time?

A. There was a gas station across the road.

(Testimony of John Martin Souza.)

Q. What did you see at that gas station?

A. Nothing in particular, I just—I didn't exactly look at the station. It was just in my line of vision.

Q. Did you see any automobiles moving? [83]

A. No, I didn't.

Q. At the time you left home, and at the ranch was there any haze there?

A. Yes, there is haze all through that country.

Q. Haze all through it. Will you please describe that haze that you have referred to for us?

A. Well, it is sort of a low-hanging mist. It wasn't high.

Q. How high? A. How high?

Q. Yes.

A. I would say not very high from the ground, maybe five feet from the ground.

Q. Five feet from the ground? A. Yes.

Q. You didn't have your windshield wiper going, did you? A. No.

Q. With that mist at 5 feet from the ground, how far ahead into the mist could you see?

A. About 600 feet.

Q. About 600 feet. How far could you see up over that mist, over that 5 feet, where there was no mist?

A. I say the mist started at 5 feet from the ground.

Q. It was a low-hanging mist? A. Yes.

Q. I want to know about the mist. Was it down on the ground? [84]

A. No, it was not down on the ground.

(Testimony of John Martin Souza.)

Q. It was 5 feet above the ground?

A. Approximately.

Q. Then underneath it, how far could you see?

A. It depends on how close to the ground.

Q. This is 5 feet from the ground. How high were your eyes when you were sitting in the automobile, from the ground?

A. About 5 feet.

Q. When you looked ahead under it how far could you see?

A. For about 600 feet.

Q. When you looked through it how far could you see?

A. About the same.

Q. About the same. So the mist didn't make any difference then, did it?

A. Yes, it did.

Q. What was the difference that the mist made?

A. Well, it entered into it, anyway.

Q. What?

A. It entered into it.

Q. I will ask you this: How far could you see where there was no mist, and how far could you see where there was mist?

A. I would say the mist was hanging through there. It didn't exactly cut off sharply at five feet.

Q. How high up did that mist go?

A. I don't know. [85]

Q. Could you see the sun?

A. Yes, I could.

Q. So it was clear, you could see through the mist, you saw the sun, itself?

A. Certainly.

Q. What is your estimate of how high above the ground the top of that mist was?

A. I couldn't say.

Q. You saw the top of trees?

A. I could see the trees if they were close to me.

(Testimony of John Martin Souza.)

Q. Was the mist as high as the top of the trees.

A. I don't know.

Q. If I understand you, this mist was lying right over this country side in a band that started approximately five feet above the ground, it didn't come down to the ground, and then was up for a distance that you could not estimate, and then above that it was clear.

A. I believe that's right.

Q. No clouds in the sky?

A. I don't know.

Q. Any wind blowing?

A. I don't remember if there was, or not.

Q. This mist, what was its character, was it damp?

A. Well, it was a cool morning. I guess you would say it was sort of damp. [86]

Q. Not damp enough, however, to get on your windshield to fog it so you had to use your windshield wiper?

A. No.

Q. Was it a mist, or was it a haze?

A. Well, it was sort of a mist, I would say.

The Court: What time of year was this?

Mr. Dunne: October 11, 1945, your Honor.

The Court: All right.

Q. (By Mr. Dunne): Did you ever have a conversation with a Mr. Aguer?

A. No; I never heard of him.

Q. Did you ever have a conversation, I think at your father's home, with a Mr. Bernard G. Aguer, an investigator, a claims agent of the Southern Pacific Company, who came there and had a

(Testimony of John Martin Souza.)

conversation with you, and I think your mother was present; do you recall that?

A. I recall some Southern Pacific Agent coming there, yes.

Q. That was on the 21st day of October, 1945, ten days after this accident?

A. I don't think it was ten days. I think it was less.

Q. You think it was less. So you were at home after the accident?

A. Yes.

Q. At the time he called your mother was there?

A. Yes, she was. [87]

A. Yes, there was a conversation.

Q. He asked you some questions about this accident and you gave him some answers; isn't that true?

A. He asked me a few questions, yes.

Q. Then as he was talking and you were talking, he wrote some things down?

A. I don't remember him writing anything, no.

Q. Isn't it a fact that he wrote some things down and you then read over what he had written down?

A. No, that is not true.

Q. Did he show you this statement and ask you to sign it, and you refused to sign it?

A. He didn't take any statement.

Q. Let me show it to you. I will show it to counsel first (handing document to counsel). There are six sheets of paper there. Have you ever seen any of those before? [88]

A. This was not written in my presence.

Q. Have you ever seen it before?

A. I have not.

(Testimony of John Martin Souza.)

Mr. Dunne: I will ask that this be marked for identification.

(The statement referred to was thereupon marked Defendant's Exhibit K for identification.)

Q. (By Mr. Dunne): Mr. Souza, I will ask you whether or not it is not a fact that on the occasion of this conversation with Mr. Aguer, the Southern Pacific claims agent or investigator, called upon you and had a conversation with you, you told him in substance or effect that on the morning and at the time of the accident it was a nice, clear, dry morning?

A. No, I didn't tell him that.

Q. Did you tell him any part of that?

A. No, I didn't tell him that.

Q. Did you tell him it was a nice morning?

A. I don't recall if I said that. When he came back I told him I didn't care to discuss the accident.

Q. Did you discuss it at all with him?

A. Well, we discussed maybe a little.

Q. Did you tell him it was a clear morning?

A. I don't recall if I did or not.

Q. Did you tell him it was a dry morning?

A. I remember I told him that I didn't care to discuss it and [89] then he left.

Q. By the way, what was the condition of the weather when you got up around 5:00, between 5:00 and 6:00? A. Well, it was cool.

Q. What else about the weather at that time?

(Testimony of John Martin Souza.)

A. Well, I don't remember if it was dark or light.

Q. Do you remember anything else about the weather at that time? A. It was cool.

Q. When you quit milking the cows, did you then have breakfast? A. Yes, I did.

Q. What was the condition of the weather at that time? A. It was misty.

Q. A mist came up after you first started in, after you first got up?

A. I don't remember if it did or not.

Q. Do you remember when the mist came up?

A. No, I don't remember exactly when it came up.

Q. It came up, however, some time after you got up?

A. I don't remember if it was there before I got up or after.

Q. Did it change in character at any time from the time you got up until the time of the accident?

A. I don't remember if it did or not.

Q. Did you in the course of that conversation with Mr. Aguer [90] say to him in substance and effect, and I ask you if it is not a fact that you did say this to him, that when you were about 100 to 150 yards away from the crossing you looked for a train? Did you say that to him?

A. No, we did not discuss that fact at all.

Q. Did you at that time say to him, "I was slowing up and driving about 30 miles an hour at that time"?

A. We didn't discuss it that far at all.

(Testimony of John Martin Souza.)

Q. Is it a fact that you then said to him, "When I looked for a train I looked through the windshield"?

A. No, I didn't say anything about that much of the accident.

Q. Did you then say, "I never seen any train"?

A. I said that I didn't see a train. Yes, I said that.

Q. You said that much? A. Yes.

Q. Is it a fact that you said to him at that time, "I could see over this grapevine-covered fence"?

A. No, I didn't say that.

Q. Did you say anything about the grapevine fence?

A. Yes, I said there was a grapevine fence there.

Q. Isn't it a fact that you said you could see over it?

A. No, I didn't say anything about seeing around it or over it.

Q. Didn't you tell him at that time, "And when I got about 40 yards from the crossing I looked again through the windshield [91] to my right and to my left"? Did you say that to him?

A. No, we didn't discuss that much of it.

Q. Didn't you say that when you were still closer to the track, "I still had the fence on my right but could see over the fence O. K."?

A. I didn't discuss it that far.

Q. Did you say to him, "When I got about 10 feet from the crossing I was slowed up to about 8 miles an hour"? Did you say that to him?

A. We didn't discuss any measurements or speeds at all.

(Testimony of John Martin Souza.)

Q. Did you tell him, "About this time I was going into the track and was going about 5 miles an hour. I was shifting from high to second gear and looking straight ahead"?

A. No, I didn't say that.

Q. Did you say any part of that to him?

A. No, I did not.

Q. Did you say anything to him about shifting gears?

A. No, I did not.

A. How long was he there?

A. I don't remember. Just maybe five or ten minutes.

Q. Aside from saying that you didn't hear anything, did you at that time say anything else about how the accident happened?

A. I don't remember if I did.

Q. Do you remember anything about it at all?

A. About what?

Q. About that conversation.

A. I know he asked the names of all the family.

Q. Did you tell him at that time that probably the reason you did not see the engine was because of the blind spot where the door hinges to the windshield?

A. No, I didn't say anything about that.

Q. Did you say anything about the blind spot at all?

A. No, I did not.

Q. Did you tell him at that time whether or not you had a driver's license?

A. I didn't say anything about an operator's license at all.

(Testimony of John Martin Souza.)

Q. Did you have any discussion with him as to where or when you had obtained the automobile?

A. I don't remember if I did or not.

Q. Do you remember anything about the conversation at all? A. Yes.

Q. What do you remember about the conversation.

A. Well, he asked the names of all the rest of my family.

Q. Is that all?

A. Well, he asked me how the accident happened and I told him I didn't see the train.

Q. Anything else?

A. Then I told him I didn't care to discuss the accident any further. [93]

Q. From the time you came down Beckwith Road and got to the point where the grapevine fence was to your right, from that time can you now recall anything that you recall seeing at that time except the front end of the locomotive when it was about 75 feet away from you, 50 to 75 feet, I think you said?

A. When I was on the tracks.

Q. Yes. Can you recall any other single thing distinctly now that you remember seeing at that time? A. No.

Q. Can you remember now anything that you heard at any time from this time 600 feet away and you came along by that grapevine fence and went up to the track?

A. I don't remember hearing anything.

Q. So of the things that you can now remember

(Testimony of John Martin Souza.)

in the course of driving up to the track and getting onto the track, of the things that you saw and that fixed themselves in your memory, that you noticed and charged your memory with, the only thing is the front end of the locomotive 50 to 75 feet away?

A. I remember when I started up, I looked up and the gas station was there.

Q. But you do not recall what you saw there?

A. No.

Q. You do not recall what trees you saw?

A. Well, the trees would be in my vision.

Q. But you do not recall what poles you saw?

A. Well, it is the same poles. I know that place pretty well.

Q. Just at that corner was there a house to the right? A. Not right on the corner, no.

Q. Somewhat back from the intersection?

A. That is right.

Q. Did you see anybody there?

A. No, I did not.

Q. Did you see anybody to your left in the walnut grove? A. No, I did not.

Q. Did you see anybody ahead of you?

A. No, I did not.

Mr. Dunne: No further questions.

The Court: Any redirect?

Redirect Examination

Q. (By Mr. Myers): So that there will be no question about it, Mr. Souza, after you brought your car to a stop approximately 20 feet from the

(Testimony of John Martin Souza.)

railroad tracks, I believe you said you looked to the right, is that right?

Mr. Dunne: That is objected to as leading.

The Court: The objection is sustained. He has already given a full description. It is not necessary to repeat it. The only object of redirect examination is merely to explain anything that he said on cross, and not to have the last word of the witness. [95]

Q. (By Mr. Myers): Mr. Souza, when you were at a stop did you look one way or the other?

A. Yes, I did when I was stopped.

Q. What way did you look first?

A. I looked to my right first.

Q. How long did you look to your right?

A. Two or three seconds.

Q. Did you look in any other direction?

A. Then I looked to my left.

Q. How long did you look in that direction?

A. Another two or three seconds.

Q. When you moved from a stop over to the point where your automobile was struck, what was your maximum speed at any time, that is, the highest speed that you went now when you moved up from the stop?

A. I would say three or four miles an hour.

Q. Three to four miles an hour, so that it went from a stop up to three or four miles an hour and then the accident happened, is that right?

A. That is right.

Q. When you looked to your right and you looked to the left, what if anything did you ob-

(Testimony of John Martin Souza.)

serve with reference to this mist or haze that you have described? In other words, I want to know how far down those tracks you had an unimpaired vision.

A. I would say I could see about 600 feet. [96]

Q. And that would be in what direction? Just one direction or both directions?

A. Well, I could probably see a little more to my left as the sun would be in my eyes.

Mr. Myers: I think that is all.

Mr. Dunne: No more questions.

The Court: Step down. Call your next witness.

Mr. Myers: Call Mr. Oran Davis. Pardon me, your Honor. I called this one witness. He is going to be a long witness. There is a member of the Highway Patrol who is out there in the witness room and who will probably not take more than a few minutes to examine. May I call him instead of Mr. Davis?

The Court: Very well.

Mr. Myers: Please send in Mr. Hansen, the Highway Patrolman, first, Mr. Davis. I do not want to keep the police officer waiting, your Honor.

The Court: All right.

ANTHONY A. HANSEN

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the jury? A. Anthony A. Hansen.

(Testimony of Anthony A. Hansen.)

Direct Examination

Q. (By Mr. Myers): Where do you live, Mr. Hansen? [97]

A. At Modesto.

Q. What is your occupation?

A. I am a state traffic officer of the California Highway Patrol.

Q. How long have you been such?

A. Approximately seven years.

Q. That was your employment on the 11th day of October 1945? A. Yes.

Q. On that day do you recall what hours you were on duty? A. Yes.

Q. What were they.

A. Nine in the morning until six in the evening.

Q. On that day or on that morning, Mr. Hansen, did you receive any call to go to the scene of an accident? A. Yes.

Q. What time did you receive that call, do you remember?

A. As near as I can remember, shortly after 9:00 o'clock.

Q. Then did you proceed to the scene of this accident? A. Yes.

Q. Where was that?

A. At the intersection of Beckwith Road and 99 Highway, at the railroad crossing, the Southern Pacific Crossing.

Q. Just tell us when you got there what, if anything, you observed?

(Testimony of Anthony A. Hansen.)

A. I observed a car, the wrecked car had apparently been thrown [98] off the track by the impact of an accident, and had broken off a wooden crossing sign and three people lying injured on the ground.

Q. What were their conditions?

A. Apparently they were very severely injured. I ascertained that one had been apparently killed outright at the time of the accident.

Q. Did you see the driver of the automobile, this young man here, Mr. John Martin Souza?

A. Yes.

Q. What was his condition?

A. He was apparently in very great shock and possibly other injuries that I could not determine at the time of the accident.

Q. What was the condition of the third occupant of that automobile? Was he conscious, unconscious or what?

A. He was more or less unconscious. He was not intelligible in his speech or anything. You might say he was unconscious for the purpose of——

Q. When you arrived there at the scene of the accident and saw these injured parties, did you interview them or anything with reference to the accident?

A. That was impossible due to their condition.

Q. What, if anything, did you do with reference to calling an ambulance? [99]

A. I ascertained that an ambulance had already been called and beset myself with assisting the in-

(Testimony of Anthony A. Hansen.)

jured people at the scene until the ambulance arrived.

Q. Besides the occupants of the automobile, did you see any members of the engine or train crew?

A. Yes.

Q. How many were there?

A. Two that I could remember.

Q. And you interviewed those, or did you?

A. I talked with them and got the pertinent information for the accident report.

Q. How long had you been there when the ambulance arrived?

A. Oh, probably seven or eight minutes.

Q. Just tell us what you did with reference to making an investigation of this accident. Did you find out whether or not there were any witnesses present?

A. Well, I——

Mr. Dunne: That is objected to as calling for hearsay. Obviously you could find that out only by asking——

The Court: I beg your pardon?

Mr. Dunne: It is objected to as calling for hearsay.

The Court: I do not know. He is not going to testify as to what he found out. He is not going to testify to hearsay. He is merely testifying to the inquiry he made. Go ahead. It may be stated whether a man asked who other than the persons [100] riding in the car may have seen the accident. Overruled.

The Witness: I was busy with the injured until after the ambulance left. I had no time to

(Testimony of Anthony A. Hansen.)

do anything other than look out for the injured people, and then I immediately, after the ambulance left, asked if there were any witnesses at the scene of the accident who had seen the accident.

Q. (By Mr. Myers): At that time did you obtain any? A. I did not.

Q. Officer Hansen, are you familiar with that particular district between North Avenue and Beckwith Road? A. Yes.

Q. The intersection of those roads with Highway 99? A. Yes.

Q. Do you know approximately how far those roads are apart? A. Approximately, yes.

Q. What is your best estimate?

A. I would say right in the vicinity of three quarters of a mile.

Q. When you came to the scene of the accident, from what direction did you come?

A. I came from Modesto. That would be traveling in a northerly direction.

Q. Do you recall what kind of a morning this was, that is, whether it was a clear morning or just what the weather conditions were?

A. Yes, it was a characteristic morning for that time of the [101] year. It was what would ordinarily be considered clear. There was a light haze hanging in the atmosphere, but nothing that would be considered out of the ordinary.

Q. How far would you say your visibility would extend, having in mind the condition of this light haze that you say was hanging in the atmosphere?

A. It would depend upon what you were look-

(Testimony of Anthony A. Hansen.)

ing at. It might extend 200 feet for one object and a thousand feet for another.

Q. That would depend upon the condition of the haze at that particular point, is that right?

A. It would depend also upon the object that you were looking at, color, shape, size, and so forth.

Mr. Myers: You may cross examine.

Cross Examination

Q. (By Mr. Dunne): Officer, do you have your report here? A. I do not.

Mr. Dunne: No further questions.

The Court: Step down. Call your next witness.

Mr. Myers: Thank you, Officer. Your Honor, may this witness be excused?

The Court: Yes, he may be excused.

ORAN DAVIS

was called as a witness on behalf of the plaintiffs and being [102] first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the jury? A. Oran Davis.

Direct Examination

Q. (By Mr. Myers): Mr. Davis, will you speak up please, in answer to the questions so some of us who are a little deaf can hear you?

A. Yes, sir.

Q. Where do you live now, Mr. Davis?

A. Los Angeles, Bellflower.

Q. Where did you live on the 11th day of October 1945?

(Testimony of Oran Davis.)

A. Modesto, out on Schumate Avenue, on the E. Freeman Ranch.

Q. This E. Freeman ranch was a dairy?

A. Yes, sir.

Q. And you were employed there?

A. Yes, sir.

Q. How long had you been employed there?

A. About a little over a year, about a year, something like that.

Q. How long did you live in the vicinity of Modesto up until the 11th day of October 1945?

A. About 10 years.

Q. Before that time, in other words, prior to this 10 years that you had lived there, where did you live?

A. Other than Freeman's—oh, prior to that? In Texas. [103]

Q. Prior to the 10 years you lived in Modesto?

A. In Texas.

Q. Born and raised in Texas?

A. Yes, sir.

Q. Mr. Davis, on the day that this accident happened you were working where?

A. E. Freeman's.

Q. Do you recall an accident that happened at the intersections of Beckwith Road and the railroad crossing? A. Yes, I do.

Q. Prior to the time that this accident happened, what were you doing?

A. Prior to this time?

Q. Yes.

A. Well, I was—what was I doing that morning?

(Testimony of Oran Davis.)

Q. That is right.

A. Well, I was driving down North Road.

Q. Where is North Road with reference to Beckwith Road?

A. It is south of Beckwith Road.

Q. I have just a rough diagram here, Mr. Davis, and I have indicated Beckwith Road here as coming into the crossing and Highway 99. Would North Avenue or North Road be somewhere to the south? A. It would.

Q. In the direction I am indicating here to the right of the [104] diagram, is that right?

A. It would be the south of it. It would be the right of it.

Q. That is right, to the south of Beckwith Road or to the right of the diagram.

A. To the right of the diagram.

Q. Where had you come from?

A. Where had I come from that morning?

Q. That is right.

A. I had come from Freeman's.

Q. Where were you going?

A. I was going over to a fellow by the name of Evans across 99, over on Dale Road.

Q. Were you alone or did you have someone with you? A. I had a fellow with me.

Q. What was his name? A. Lucas.

Q. Do you remember his first name?

A. Louis Lucas, I believe.

Q. Where did he live or work then?

A. He lived about a quarter of a mile to the west of me, working for a fellow by the name of Corsan.

(Testimony of Oran Davis.)

Q. What was his occupation?

A. Dairy milker.

Q. Do you know where he lives now?

A. No, I do not. [105]

Q. What was the last time you saw Mr. Lucas?

A. The last time I saw Mr. Lucas was about—well, it was about in the middle of the year, in July, I believe, of 1945, something like that. I don't recall the exact date.

Q. 1945 or 1946?

A. 1945. I don't know just exactly—oh, '45—no, I have seen him about a month after that or something like that. I don't know just when. I know I had taken him there. I didn't know the fellow so well. I had taken him over to this place on the morning of the accident. He hired me to take him over there to this Mr. Evans' ranch and after that he moved away, and I met him at one time after that. I don't know just exactly how long it was, maybe a month or two after that, something like that.

Q. In any event, Mr. Davis, did you see an accident between a locomotive and an automobile at the intersection of Beckwith Road and the Southern Pacific railroad tracks there?

A. I did, yes, sir.

Q. Had you seen that particular locomotive before this accident happened?

A. Before? Yes, sir.

Q. Where was that locomotive when you first saw it?

A. Just behind me, after I crossed North Road,

(Testimony of Oran Davis.)

across the crossing, the railroad crossing on North Road—just not exactly behind me, behind and to the left of me. [106]

Q. Here is a diagram that Mr. Dunne has put on the board, and according to that diagram North Road comes into the right of the map here across the railroad tracks. This is Highway 101 running through here. Here is Beckwith Road over to the left. In other words, Beckwith Road would be approximately north or northwest of North Avenue.

A. It is 99 instead of 101.

Q. Did I saw 101? I am sorry. Highway 99. And you say the locomotive was behind you when you first saw it? A. Yes, sir.

Q. Whereabouts was it behind you? Just indicate here, if you will.

A. Just as I went across the road, across here, I stopped at the railroad crossing and looked down the track, and I rolled across, and it whizzed behind me about 10 feet after I crossed; I looked around to my left and to the side of me and there it was.

Q. When you say it whizzed behind you, whereabouts was your automobile?

A. It was about 10 foot across the track to the east.

Q. To the east of the track, is that right?

A. Yes.

Q. What, if anything, that caused your attention to the locomotive as you went across the track?

Mr. Dunne: That is objected to as immaterial.

The Court: Overruled.

(Testimony of Oran Davis.)

The Witness: Go ahead and answer?

The Court: Go ahead.

The Witness: I didn't see the train. I stopped at the track. I didn't see the train, and when it whizzed behind me it excited me and so I thought, "Well,—"

Mr. Dunne: Just a moment.

Mr. Myers: Leave out what you thought, Mr. Davis.

The Witness: The train looked dangerous to me, see?

Mr. Dunne: I move to strike that out.

The Court: That may be stricken out.

The Witness: It caused me—I whizzed onto 99 and I went right on up the road, increased my speed up rapidly to try to clock the train, to see how fast it was going, and I made a remark——

Q. (By Mr. Myers): Wait a minute. Now, why did you do that?

A. Well, I knew it was dangerous, you see, the way it was going.

Mr. Dunne: I move to strike that out.

The Court: That my stricken. He can describe his act. It is not a question requiring the intent of a person. We are dealing with what he did and what he saw. The jury are to disregard any answer which I have stricken.

Q. (By Mr. Myers): You took out after it, is that right? A. I did. [108]

Q. Did you have your eye on that locomotive then continuously up to the time that this other accident happened? A. Yes, sir.

(Testimony of Oran Davis.)

Q. Will you tell us whether or not during that whole distance that the locomotive traveled while you were watching it there was any bell ringing on that locomotive or any whistle sounding?

A. No, sir.

Q. Did any whistle sound at all when you crossed the track at North Avenue?

Mr. Dunne: That is objected to as immaterial and calling for a conclusion.

The Court: I think I will object to that. He said he did not see the train, and therefore the same ruling applies to him as I made in the case of the other witness. He can only testify as to whether he heard a whistle.

Mr. Myers: Yes, your Honor.

Q. Did you hear any bell or any whistle?

A. I heard a whistle just after he crossed North Road.

Q. After you crossed? A. After I crossed.

Q. After you crossed the railroad track——

A. Yes, sir.

Q. —you say you then heard a whistle?

A. After I crossed, the train was just across North Road, it [110] whistled.

Q. How did it whistle?

A. Just one blast.

Q. You took out after this engine, Mr. Davis, and tell us what, if anything, you saw at Beckwith Road.

A. I had taken out after the engine. I wanted to know how fast it was going because it almost got me.

(Testimony of Oran Davis.)

Mr. Dunne: I move to strike that out as a conclusion. This man can state what he did, what he saw and what he heard.

The Court: That may be stricken. Strike that out.

The Witness: I seen a car coming up on Beck-with Road, just up the crossing there, and then "bang" it hit it, and debris blew all over. And so I turned right around, just in the intersection of Dale Road, and I pulled out and went back over to the accident.

Q. (By Mr. Myers): Now, you say you turned right around at the intersection of Dale Road and Highway 99. Will you look on this map and see if you see the intersection of Dale Road and Highway 99?

A. Yes, sir, right here (indicating).

Q. At this point you say you turned around and you did what?

A. Turned around and went back over to the scene of the accident.

Q. When you got over to the scene of the accident what, if anything, did you see? [110]

A. When I got over there I seen an elderly man who was laying out—one of the elder of the three—laying out, apparently dead, and one of the boys was laying out prone there, seemed to be unconscious, and another one of the fellows was in the car, so I got in there and helped to take him out.

Q. Did you see this young man here, John Martin Souza?

A. Yes, sir.

(Testimony of Oran Davis.)

Q. Where was he?

A. He was laying prone out at the front of the accident like facing east.

Q. Was he conscious or unconscious?

A. He was unconscious.

Q. What else did you do then?

A. Well, I stayed there and helped around there until the ambulance came up, and then I went on my way.

Q. While you were there did you observe what, if anything, happened to the engine, the locomotive?

A. In the accident, you mean?

Q. No, after the accident.

A. Well, they backed down the track—they went on up the road quite a ways, a thousand foot or better, and then they backed down and the engine crew got out, three or four fellows.

Q. You say they went on down the highway a thousand feet or better?

A. Anyway a thousand feet or better. [111]

Q. When they backed down or backed to the scene of this accident, did you observe how many people got out of the cab of that locomotive?

A. I know it was three.

Q. You know that there were at least three?

A. I know that there was at least three.

Q. Did you observe anything about that locomotive with reference to its color or anything?

A. I know it had a silver front. I know that.

Q. On this particular morning, as you drove down North Avenue and you made your stop there

(Testimony of Oran Davis.)

at the intersection of North Avenue and the railroad tracks, what, if anything, did you observe with reference to climatic conditions?

A. Well, the sun was shining in my face, there was a kind of a hazy morning, and I suppose that obstructed my view of the train.

Q. How far down the railroad tracks to your right and to your left could you see?

A. Oh, about 250, 300 feet.

Q. 250 or 300 feet, is that right, sir? How would you describe that haze? Was it a fog or just what was it?

A. It was a low-hanging haze, a fall morning. I don't know. It was just about right in my eyes where I couldn't see very far. It wasn't a cloudy morning. It was kind of a haze, kind of a damp fog. [112]

Q. This was a fall morning and was it cold that morning?

A. Well, it wasn't so cold. It was kind of a cold morning.

Q. The sun was shining brightly, was it?

A. Yes, sir.

Q. Any estimate as to the speed of the locomotive as it traveled from the point you first saw it at North Avenue up to the scene of the accident at Beckwith Road?

A. You want to know how fast we figured it was going?

Q. What is that?

A. You want to know how fast we thought it was going?

(Testimony of Oran Davis.)

The Court: That is right, not in terms of fast or slow, but in miles per hour.

The Witness: 60 miles an hour.

Mr. Myers: You may cross examine.

The Court: I think so as not to break the continuity of the cross examination we will take a short recess at this time. It is stipulated the usual admonition has been given. Ten minutes.

(Recess.) [113]

The Court: Proceed.

Cross-Examination

Q. (By Mr. Dunne): Mr. Davis, you were driving east on North Road approaching the railroad track and Highway 99, were you?

A. Correct.

Q. Before crossing a railroad track you stop; is that right? A. Yes.

Q. You were stopped. When you stopped how far could you see to your right?

A. About 250 or 300 feet.

Q. How far could you see to your left?

A. Oh, a little further than that.

Q. How much further?

A. Maybe a hundred, two hundred feet further.

Q. Then to your left you could see only 350 to 400 feet; or so, is that correct?

A. To my left, or right? I could see 250 or 300—the sun was shining in my face.

Q. To your left.

A. I could see further.

(Testimony of Oran Davis.)

Q. I want to know how far.

A. Three or four hundred feet.

Q. Why couldn't you see any further?

A. Why couldn't I?

Q. Yes. [114]

A. On account of a haze.

Q. Will you please describe that haze for us?

A. Well, it was a little mist or a haze hanging above the ground four or five feet.

Q. Was it down to the ground?

A. No, it wasn't exactly right on the ground.

Q. How high above the ground did it extend?

A. Something like ten or twelve feet.

Q. Above that the sun was shining?

A. Yes.

Q. So there was no haze to interfere with an object that was 15 feet high?

A. Well, there must have been; I didn't see the trees.

Q. Never mind about not seeing the trees. I want to know about the haze. Was there anything in the haze to interfere with an object that was 15 feet above the ground? A. Yes.

Q. What? A. The haze.

Q. How high was that haze?

A. Well, I don't know just how high it was.

Q. Give us your best recollection.

A. 12 to 15 feet.

Q. 15 feet, now. Was it higher than 15 feet?

A. I don't know. [115]

Q. You did say that you crossed the railroad track and the locomotive passed behind you, did it not? A. Yes.

(Testimony of Oran Davis.)

Q. Was that locomotive continuously and continually in your vision from that time until the time of the accident?

A. Did he continue on in my vision? I whizzed right around the turn to my left on Highway 99 and went right on up the road 45 to 50 miles an hour.

Q. Were you looking at the locomotive?

A. Yes.

Q. Was it within your vision all this time?

A. It was.

Q. Anything to interfere with that vision?

A. No.

Q. Did it ever pass out of your vision?

A. No.

Q. Highway 99 is a divided highway and was at that time? A. Yes.

Q. There were trees in the middle of that island dividing the two sets of lanes, weren't there?

A. Well, the way I remember, I don't know; I don't think so.

Q. Were there any trees or shrubs along the side of the railroad track between you and the locomotive?

A. Not between me and the locomotive, no.

Q. Take a look at this picture. You will see on the far [116] side of the railroad track there a row of trees. Were they there at the time of the accident?

A. On the far side of the railroad track?

Q. Yes.

A. They were there.

(Testimony of Oran Davis.)

Q. They were between you and the locomotive, were they not? A. No, sir.

Q. Were they there?

A. They were there, but they wasn't—those trees are—not between me and the locomotive.

Q. Those trees are between the railroad track and Highway 99, aren't they? A. No.

Q. That is Defendant's F. Will you look at Defendant's Exhibit H and tell me whether the row of trees that appears there is between the railroad track and Highway 99?

A. That row of trees comes out in opposite direction on 99; that is not between the railroad track—99 and the railroad track.

Q. You recognize that picture?

A. That looks like—that is Beckwith Road with the little road turning out, that is about right there.

Q. Can you in that picture distinguish Highway 99? A. Yes. Oh, no, I can't.

Q. Look at Defendant's Exhibit I. Do you see Highway 99, or [117] any part of it, in that picture?

A. I don't see it there. I don't know much about photographs.

Q. What is this right along here, a paved strip I am putting my finger to the left of that picture, beyond this railroad track? A. What is that?

Q. Yes.

A. That is a paved strip, that is a road.

Q. What road?

A. I don't know what road; I can't tell.

Q. Is it any part of Highway 99?

(Testimony of Oran Davis.)

A. It looks more like 99 over here, but it is not, I know. That is Beckwith Road. I know it by this.

Q. You can't see Highway 99 in that picture, at all?

A. No. If that is it over there, that is it.

Q. On that picture as you look at it, were those trees between the railroad track and the road?

A. Well, that don't look like Highway 99 to me.

Q. I show you Plaintiff's Exhibit No. 2. Can you recognize that photograph? A. Yes.

Q. What is that?

A. That is a railroad crossing.

Q. Where?

A. I can't tell. That is just a cross-arm on a railroad. It [118] doesn't show exactly where, plainly.

Q. Do you see beyond the railroad track in that photograph a row of trees? A. I can.

Q. Do you see any highway between the trees and the railroad track?

A. I can see a print of a road there; I can't swear it is 99 in that picture, from that photograph.

Q. It is your testimony now, however, that as you came northward on Highway 99, and as the locomotive was traveling from North Road toward Beckwith Road, that you were looking at the locomotive all that time? A. Yes, I did.

Q. And it was always within your vision?

A. Yes.

Q. There was nothing to interfere with your vision whatsoever? A. No.

(Testimony of Oran Davis.)

Q. I show you a photograph and ask you if you can recognize that.

A. I do. That is 99.

Q. Highway 99. Where?

A. Well, I don't know where. I know it looks like 99.

Q. Will you notice in that photograph there are two lanes of highway? A. Yes.

Q. How many lanes of highway were there on 99? [119] A. Two lanes.

Q. Just two?

A. Just two. Well, it is a double highway, four lanes.

Q. Four lanes. There were two lanes for northward traffic from Modesto up toward Manteca?

A. Yes.

Q. And there were two lanes for southward traffic from Manteca toward Modesto?

A. Yes.

Q. They were divided by a strip in between, were they not? A. Yes.

Q. There were trees and shrubbery growing in that strip?

A. Well, some places along this road, yes; other places it was not.

Q. Between North Avenue and Beckwith Road, in that strip between the two pairs of lanes, were there any trees or shrubbery?

A. No, I don't think there was. I could keep my eye right on the train all the way up.

Mr. Dunne: I ask this be introduced for identification.

(Testimony of Oran Davis.)

(The photograph was marked Defendant's Exhibit L For Identification.)

Q. (By Mr. Dunne): I will show you another picture and ask you if you recognize that photograph. A. That is Highway 99.

Q. Where, do you know? [120]

A. I don't know just where, but I recognize the line here, looks like a chicken ranch there that I used to have.

Q. That is between North Road and Beckwith Road, isn't it? A. No, it is not.

Q. It is between the intersection of North Road and Dale, isn't it?

A. No. I am pretty sure it is not.

Mr. Dunne: I ask this be marked for identification.

(The photograph was marked Defendant's Exhibit M for Identification.)

Q. (By Mr. Dunne): I show you another picture. Do you recognize this?

A. Yes, sir. Looks like Highway 99.

Q. Do you know where?

A. No, I don't know where.

Mr. Dunne: I ask that this picture be marked for identification.

(The photograph was marked for Defendant's Exhibit N for Identification.)

Q. (By Mr. Dunne): Here is another one. Do you recognize that?

(Testimony of Oran Davis.)

A. It looks like—all I say say, it looks like Highway 99.

Q. Do you know where? A. No.

Mr. Dunne: I ask that this be marked for identification.

(The photograph was marked Defendant's Exhibit O for [121] Identification.)

Q. (By Mr. Dunne): Do you recognize that photograph?

A. I don't know exactly.

Q. Don't you recognize that as the intersection of Highway 99 and Dale Road?

A. And Dale Road? That don't look like Dale. Dale Road turns off to the right of 99.

Q. Isn't that road intersecting there turning off to the right?

A. Well, this picture is going north, it is——

Q. Look at it again. Do you know Brownie's gas station? A. Brownie's?

Q. Yes.

A. Is that right next to Woodbridge Store? I know it.

Q. That's right.

A. I know it, then. I didn't know the name of it.

Q. Do you see it in that photograph?

A. I believe I recognize the station, there. I can't tell that it is.

Q. Is that the gas station on Highway 99 that is slightly north of where Dale Road turns off?

A. I am not positive. I believe that is it. If that is the gas station that is it.

(Testimony of Oran Davis.)

Q. Do you know where the power line is?

A. Yes. [122]

Q. Do you recognize the power line in that photograph, power towers?

A. That doesn't look quite like that. Dale Road doesn't turn off—don't look like it turns off at that short an angle. However, it could. I don't know much about photographs. I can't tell too much about them.

Mr. Dunne: I ask this be marked for identification.

(The photograph was marked Defendant's Exhibit P for Identification.)

Q. (By Mr. Dunne): Do you recognize that one? There is a sign there that may help you.

A. That is more plain. That is more like it.

Q. What is that? A. It is Dale Road.

Q. Just ahead do you see the gas station?

A. Yes.

Q. And the power line tower? A. Right.

Q. And Highway 99? A. I do.

Q. Do you recognize it? A. Yes.

Q. And beyond that a row of trees between those two lanes and the other two lanes; isn't that correct?

A. I see in this picture some low shrubs here, some trees [123] on up—

Q. Between where that picture was taken and the railroad tracks?

A. That is the way the picture shows here.

(Testimony of Oran Davis.)

Q. Is that a correct representation of the way it appears at that time in that point approximately south and east of the intersection of Dale Road and Highway 99, looking in a generally north-westerly direction?

A. Well, I can see—I don't know where, exactly—it don't look exactly right there. This, here, the row of trees begins past, on the other side, north of Beckwith Road, looks in the picture.

Q. What is this row of trees, right here, to the very left of the photograph? A. What is that?

Q. Yes.

A. The very left, it looks like a walnut orchard.

Mr. Dunne: We ask that this be marked for identification.

(The photograph was marked Defendant's Exhibit Q for Identification.)

Q. (By Mr. Dunne): After you crossed the railroad track you were going to turn left on Highway 99, were you not? A. Yes.

Q. Using the directions you have been using, you were going to cross over to the north lane?

A. Cross the north lane? [124]

Q. Across to the north lane, and you were going to turn left and go north on Highway 99?

A. Because there is a right-hand lane, naturally.

Q. In order to do that you had to cross two south lanes, southbound lanes, didn't you?

A. Cross two southbound lanes?

Q. Yes.

A. Yes. The one lane over there, had to cross the left lane going into the right lane.

(Testimony of Oran Davis.)

Q. Did you make a stop before you crossed those two southbound lanes?

A. I went up there and paused, and there was no traffic coming, so I whizzed right on around.

Q. Let's get this straight, then. You came down North Avenue, or North Road, toward the railroad track, and stopped? A. Yes.

Q. I will put a cross there. I am drawing a line now following your course. Then you went across the railroad track and stopped again before crossing the southbound lane?

A. Naturally, just paused a minute, just a minute; there wasn't traffic that morning, it wasn't much at that time of the morning, so I just whizzed right on around.

Q. But you did make a pause there?

A. Just a pause.

Q. Just after you crossed over the railroad track about ten [125] feet that locomotive went by?

A. Yes.

Q. Then it passed you before you made the pause? A. Yes, just before I made it.

Q. Then after you made the pause you crossed the southbound lane and got into the northbound lane; is that correct?

A. It is a wide crossing there.

Q. So you got into the north lane and you kept on up the north lane until you got to the crossing with Dale Road? A. Yes.

Q. Now, then, as you were traveling, after you got in the north lane, you were traveling up to-

(Testimony of Oran Davis.)

ward Dale Road, you were going 45 miles an hour?

A. Well, 45 or over. I never looked at my speedometer.

Q. Do you remember when your deposition was taken in this case? A. Yes.

Q. Your deposition was taken in Mr. Myers' office in the Bank of America Building, in Oakland, on the 7th of November, 1946, was it not?

A. 7th of November?

Q. Yes.

A. I don't remember the exact date. I know I was up there, yes.

Q. It was taken about November, 1946?

A. Yes. [126]

Q. At that time you were under oath, were you not? A. Yes.

Q. And questions were put to you and you made various answers; is that correct? A. Yes.

Q. At that time were you endeavoring to testify truthfully? A. Never, did you say?

Q. Were you trying to testify truthfully.

A. Yes.

Q. I want you to look at page 20 of your deposition, at line 9. At that time I will ask you if this question was put at you and you did not give this answer:

"Q. How fast did you travel down the highway after you turned on to Highway 99 going north to turn down Dale Road?

"A. Oh, about 45."

Did you so testify?

(Testimony of Oran Davis.)

A. Well, between 45 and 50 or 60 miles an hour.

Q. Please, just a minute. Did you so testify when your deposition was taken?

The Court: I presume counsel will stipulate that——

Mr. Myers: Yes, I will stipulate.

The Court: It is continuing on his deposition he so testified.

Mr. Dunne: Line 19:

“Q. You drove from North Road and the intersection of [127] the railroad track, down Highway 99, and then down Dale Road to a point about opposite the scene of the accident?

A. Just about opposite, maybe not quite, I don't know.

Q. At 45 miles an hour, is that right?

A. That is right.”

A. Between 45 and 50.

Q. Just a minute. Did you so testify?

Mr. Myers: I will stipulate the witness did.

A. I did.

Q. (By Mr. Dunne): On your deposition you did not say between 45 and 50, did you?

A. I don't remember if I said it, or not.

Q. Is that correct, is that the way you testified on your deposition, what you have before you, there? A. That is the way I testified.

Q. All right. After you got to Dale Road you turned to the right on Dale Road, did you not?

A. Yes.

Q. You then went down Dale Road about a quarter of a mile? A. No.

(Testimony of Oran Davis.)

Q. Now, if you will turn to page 15 of your deposition, look at line 3:

“Q. About how far had you gone down Dale Road at the time of the accident?

A. Well, just about—oh, something like a quarter of [128] a mile.”

You so testified, did you not?

A. I went back over to——

Q. Just a minute. Answer my question, please.

A. I so testified.

Q. If you have an explanation you can give it.

A. I testified to that, yes.

Q. The next question and answer:

“Q. Were you about at a point where, if Beckwith Road ran right straight on through across to Dale Road, would that be about the point where you were? A. Approximately.”

Did you so testify? A. Yes.

Q. Then if you will look at this diagram, this is Beckwith Road if Beckwith Road were extended across the field, it would extend right across to about where Walnut Road is? A. Yes.

Q. That is about where you got, to the opposite of Beckwith Road?

A. No, I got down in here. I was over, right in about there.

Q. You got right in here. I will put on this exhibit, which is Court's Exhibit 1, a circle right around.

Let me ask you this question: On your deposition you testified: [129]

(Testimony of Oran Davis.)

“Q. Were you about at a point where, if Beckwith Road ran right straight on through across to Dale Road, would that be about the point where you were? A. Approximately.”

Did you so testify?

A. Yes, I testified.

Q. Was that testimony correct at the time you gave it?

A. Well, since then I have been up there. I would state I wasn't that far up the road.

Q. That was your best recollection in November, 1946, at the time your deposition was taken, wasn't it?

A. That was my best recollection, yes.

Q. Now, you have been up there since then; is that correct?

A. On the way up from Los Angeles the other day I drove up the road just to refresh my memory on it to see really where I was at.

Mr. Myers: Pardon me, your Honor: May I ask counsel what page he is referring to in the deposition?

Mr. Dunne: Page 15. I thought I told that to the witness.

Mr. Myers: Thank you.

Q. (By Mr. Dunne): Now, did you see the accident, itself? A. Yes.

Q. Will you please tell us exactly what you saw?

A. Just as I entered Dale Road I seen a car come up on the crossing of Beckwith Road, and

(Testimony of Oran Davis.)

just at the time of the accident [130] they just approximately, they was almost together, and then I seen debrie flying through the air, fenders, tires and things, and then I turned right around right then and went right back over there, over to the accident, the scene of the accident, to help take care of the injured.

Q. What color was the automobile?

A. Well, the automobile was, I don't know, I don't remember exactly, some kind of a light color, grayish, blue, tan color, or something.

Q. You had no trouble seeing that through the haze, did you? A. No, I did not.

Q. Did you see the automobile knock down one of the crossing signs at the crossing?

A. I seen when the train hit it, it hit the sign and the sign went up in the air.

Q. The sign was painted white, wasn't it?

A. Yes.

Q. You had no trouble seeing that through the haze, did you?

A. Had no trouble looking to the left. I could see further to the left.

Q. How far, what is your estimate of the distance from the crossing—the distance from the intersection of Dale Road to the crossing?

A. I will say about five or six hundred feet, in my estimation.

Q. Were there any trees, or shrubs, or anything of that sort [131] within your line of vision?

A. There was nothing to obstruct my view.

Q. I want to call your attention to this dia-

(Testimony of Oran Davis.)

gram. The circle you put as being the place where you stopped and turned and the point of accident. Will you now say there were no shrubs or trees or anything that would affect your line of vision?

A. There wasn't nothing. I could see the locomotive and the car plain.

Q. About what time of the morning was it?

A. It was around nine o'clock.

Q. After the accident did the locomotive keep going? A. Yes.

Q. How far did it go?

A. Oh, about a thousand feet, something like that.

Q. Did you see it stop?

A. Yes, I seen it stop, after I was up there, got up there and they stopped and backed up.

Q. Had you seen it stop before you turned on Dale Road? A. No, I didn't.

Q. As you made the turn at Dale Road, did the locomotive pass out of your sight at any time?

A. No.

Q. You were looking at it all the time?

A. All the time.

Q. You made a right-hand turn into Dale Road without taking [132] your eyes off the locomotive, is that correct?

A. Dale Road isn't on exactly a right-hand turn, not a direct right-hand turn.

Q. You made some kind of a turn?

A. I did.

Q. Without taking your eyes off the locomotive?

(Testimony of Oran Davis.)

A. Well, might have been a glance off; anyway, just a turn, I was looking right at that.

Q. Coming up the highway you were watching the highway and the traffic?

A. On my side I didn't have to watch.

Q. As a matter of fact, you were watching the road where you were driving?

A. Naturally, you would watch the road.

Q. And you were looking for Dale Road?

A. I didn't have to look for it. I knew right where it was.

Q. You were watching for it, weren't you?

A. Certainly.

Q. When you turned you looked along Dale Road as you made the turn?

A. I had to look at it a little bit.

Q. Now, isn't it the truth that you drove up Dale Road to approximately where Walnut Avenue is?

A. No.

Mr. Dunne: I have no further questions. [133]

Redirect Examination

Q. (By Mr. Myers): At the time of the taking of your deposition, Mr. Davis, you were asked, I think it was on page 26, this question:

"So there will be no confusion in the record, as I understand your testimony, the accident happened at Beckwith Road, which is about 4/5 of a mile from the North Road crossing, is that correct?

A. That is right."

A. (The Witness): Yes.

Q. "Q. And at the time of the accident at Beck-

(Testimony of Oran Davis.)

with Road you were approximately a half a mile north of the North Road crossing?

A. That is right."

That was the testimony you gave at the time of the taking of your deposition; is that right?

A. Yes.

Mr. Myers: Your Honor, may I ask counsel if he is willing to stipulate that some photographs in the original deposition of this witness taken at my office—I would like to put them in evidence. I would like to offer these photographs in evidence as Plaintiffs' Exhibits next in order, so they may be in evidence. We can just detach them from the deposition, can we not, Counsel?

The Court: Well, I will take care of the technique. [134] We don't usually detach them from the deposition, but he can take them by reference.

Mr. Dunne: I think, as a matter of fact, it is in evidence. I think they are duplicates of the photographs that are already in.

Mr. Myers: I don't think one or two of them are in evidence. Rather than go into that, if your Honor will permit——

Mr. Dunne: Then I will prefer to have a foundation laid, either by reading the testimony in the deposition, or showing them to the witness.

Mr. Myers: Well, all right.

Q. I show you Plaintiffs' Exhibit No. 1 attached to your deposition and ask you if that is a fair representation of the railroad track running in an easterly and westerly direction in the vicinity of Beckwith Road. A. Yes.

(Testimony of Oran Davis.)

Mr. Myers: I will offer that in evidence, your Honor, as plaintiffs' exhibit next in order.

(The photograph was marked Plaintiffs' Exhibit 6 in evidence.)

Q. (By Mr. Myers): I show you another photograph marked Exhibit 2 in the deposition, and ask you whether or not that is a fair representation of Beckwith Road and the grapevines on the south side of Beckwith Road at the intersection.

A. Yes. [135]

Mr. Myers: We offer that in evidence as Plaintiffs' Exhibit next in order, your Honor.

(The photograph was marked Plaintiffs' Exhibit 7 in evidence.)

Q. (By Mr. Myers): I will show you Exhibit No. 3 in your deposition, Mr. Davis, and ask you whether or not that is a fair representation looking east on Beckwith Road into the intersection of the railroad tracks with Beckwith Road.

A. Yes, it is.

Mr. Myers: We offer that in evidence as Plaintiffs' Exhibit next in order.

(The photograph was marked Plaintiffs' Exhibit 8 in evidence.) [136]

Mr. Myers: This one is marked Defendant's Exhibit No. 2, your Honor. This one is marked Defendant's Exhibit No. 1, your Honor. I may as well put it in.

The Court: All right.

(Testimony of Oran Davis.)

Q. (By Mr. Myers): Attached to the deposition is Defendant's Exhibit 1 which purports to show the end of Beckwith Road as it runs into the intersection with the Southern Pacific tracks, and I ask you whether or not that is a fair representation of that intersection.

A. That is a fair representation.

Mr. Myers: I offer that in evidence as plaintiff's exhibit next in order.

(The photograph in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 9.)

The Court: You can leave them there or detach them and use them by reference, whichever way you want. I think it is better to detach them, Mr. Clerk. Anything further?

Mr. Myers: Pardon me just a second, your Honor. I think that is all.

Recross-Examination

Q. (By Mr. Dunne): Mr. Davis, on that same deposition immediately after the part that counsel read to you—I will show you my copy while the Clerk is using the original—look at page 27, line 6, and I will now ask you whether or not in your deposition you did not testify in this way: [137]

“Q. And the accident happened about how far from where you were at that moment; in other words, having in mind your position?

“A. Well, to the best of my knowledge, about 300 yards.

(Testimony of Oran Davis.)

“Q. About 300 yards? A. Yes, sir.

“Q. Or 900 feet, something like that?

“A. Something like 900, something like that.”

Did you so testify?

A. I so testified there at that time.

Q. Now, Mr. Davis, when your deposition was taken you weren't served with subpoena, were you; you were not served with a subpoena when your deposition was taken? A. No.

Q. You appeared for the taking of that deposition by arrangement with Mr. Myers, did you not?

A. No.

Q. Who made the arrangements?

A. I don't know. I was called.

Q. You came up to Oakland?

A. I came to Oakland. The first deposition was somebody in Modesto, some insurance company in Modesto, an adjuster.

Q. I am talking about the one in Oakland.

A. Someone called me. I don't remember just now; I don't remember. I was called in to Oakland. [138]

Q. Before your deposition was taken, did you discuss your testimony with anybody? A. No.

Q. Nobody at all? A. No.

Q. Did you discuss it with Mr. Myers at all?

A. No.

Q. Did you discuss it with Mr. Myers?

A. No.

Q. Did he ask you what you knew about the accident? A. No.

Q. Did he ask you whether you knew anything about it at all? A. No.

(Testimony of Oran Davis.)

Mr. Dunne: No further questions.

Further Redirect Examination

Q. (By Mr. Myers): Mr. Davis, with reference to the direction of the sun, so there will be no doubt about that, your Honor, is there a crayon or something we might use to mark that map?

The Court: He wants a blue pencil or red pencil.

Mr. Myers: A blue pencil.

Q. What direction was the sun shining from on the morning of this accident, generally?

A. Well, generally, easterly, a little southeasterly direction.

Q. So if you were going up North Avenue, it would be a little [139] to your right but facing you?

A. Yes.

Q. If you were going up Beckwith Road, it still would be a little to your right but facing the driver?

A. Yes.

Q. So if we put the sun up in here, would that be about right?

A. The sun wasn't so high.

Q. Well, how would you——

A. That would be about right.

Q. Let's put it this way. Was the sun high enough so it shone above your face as you drove your car east on North Avenue or was it low enough so it shone in your face?

A. It shone in my face.

Q. With reference to your deposition that was taken in the office, Mr. Davis, do you know who it was who got in touch with you first?

(Testimony of Oran Davis.)

A. I believe Mrs. Souza got in touch with me.

Q. Was that the first time that you were asked to come to my office? A. Yes.

Q. Then when you got to my office did we talk about the facts of what you knew about the accident? A. No.

Q. Didn't I ask you questions about it and you told me what [140] you knew about the accident?

A. Yes, in the deposition room.

Q. But before the deposition was taken didn't I ask you questions about it and didn't you tell me what you knew about it?

A. You asked me what I knew about the accident, yes.

Q. And you told me about it, did you not?

A. Yes.

Q. You came up here again prior to this trial?

A. You mean this time?

Q. Yes.

The Court: He has not asked him about that. He asked him about the deposition.

Mr. Myers: All right. Thank you, your Honor. That is all.

Mr. Dunne: That is all.

The Court: Just one minute. Let me understand something. I don't quite get the idea of what you mean by haze. You say the sun was high. What time of the morning was it?

A. 9:00 o'clock.

Q. It was a bright day, was it not?

A. Yes, it was a clear day.

(Testimony of Oran Davis.)

Q. What do you mean by haze?

A. Well, just a kind of steamy haze from the ground.

Q. What was it, steamy haze rising from the ground? A. Yes. [141]

Q. Is that what they call a valley tule fog?

A. I suppose so.

Q. But it was early in October. It does not get cool down there early in October, does it, so there is no such variation between night and day that you get land fog that sticks to the ground the way it does early in the spring?

A. Well, it was that way that morning.

Q. It was? A. Yes.

Q. What was it; was it a mist or fog—

A. A little ground fog, I guess, or haze, steamy ground.

Q. It wasn't from the atmosphere as though it were going to rain? A. No.

Q. You would not call it a fog as they would call it in Los Angeles?

A. No. I would call it a haze.

Q. Atmospheric—shall I use a big word?—atmospheric haze? A. Something like that.

Q. Was it high? How high off the ground?

A. I would say 12 or 15 feet.

Q. Above the ground?

A. Well, it was that way above the ground.

Q. Was it solid to the ground?

A. No. [142]

Q. Was it like they call a pea soup fog—they don't have those in San Francisco—I am just try-

(Testimony of Oran Davis.)

ing to find out what you mean by haze. Everybody is talking about it. Early in October, it is in the tropical part of California where it still is warm during October.

A. That particular morning it was just a kind of low-hanging, little bit of haze above the ground. I will say it was above the ground from 5 to 6 feet up to about 12 to 15 feet.

Q. Did it affect visibility? A. Yes.

Q. To what extent did it affect visibility?

A. I don't know; I couldn't see against the sun.

The Court: That is all. I just wanted to know what he meant by haze.

Mr. Myers: Just one more question.

Q. With the sun, then, over here to the east or southeast, and you looked to the left, in other words, you look away from the sun. Will you tell us whether or not your visibility was better?

A. Well, I could see further away from the sun.

Mr. Myers: That is all.

Q. (By Mr. Dunne): Was the sun casting any shadows that morning?

A. I suppose it was.

The Court: Well, do you know? Do you remember whether it [143] was?

A. I don't remember if it was making shadows.

Q. (By Mr. Dunne): Do you remember any shadows from your car?

A. I didn't look at the shadows of my car.

Q. What kind of a car were you driving?

A. Ford.

Q. Open or closed? A. Closed, Ford sedan.

(Testimony of Oran Davis.)

Q. Did you notice any shadows from the sun inside the car?

A. Well, I know the sun was shining, but I don't think I had any shadows in there. I don't remember whether I had any shadows in there or not.

Q. Was it shining inside the car?

A. I suppose it shined through the windshield.

Mr. Dunne: I have no further questions.

The Court: You called it a haze. Let me ask you this: Was it misty or was there any mist on your windshield?

A. No. It was no mist; it was just, well, it would dim your windshield a little, but still a haze—

Q. Still getting back to the same thing.

A. When you looked off, out against the sun, you couldn't see; it was just a haze covering—

Q. What time did you get up that morning?

A. Four o'clock.

Q. You have an early dawn? [144]

A. Yes.

Q. At that time of the year you have an early dawn. What time was it light?

A. I don't know. An early dawn, I don't know just when.

Q. About 5:00 o'clock it is light at that time of the year? A. Well, not in October.

Q. What time on that day, if you remember?

A. I don't remember. I imagine about 6:00.

Q. About 6:00. So there were three hours of light before this happened? A. Yes.

Q. Do you know what the atmospheric condi-

(Testimony of Oran Davis.)

tion was, say, at the time you got up, say at 6:00 o'clock or at 7:00 o'clock, that is, compared with 9:00 o'clock?

A. I got up—I milk cows. I got up at 4:00 o'clock and, of course, at that time I didn't pay no attention to the atmospheric condition but on that morning, you are always irrigating and you always have steam, fog; it was not a high fog.

Q. Would you say that existed early in the morning? A. Yes.

Q. Do you remember observing it?

A. No, I don't remember observing it.

Q. But you would think that it probably existed for some time before 9:00 o'clock?

A. Naturally. [145]

Q. How long?

A. I would say that the sun comes up and warms up.

Q. What hour would that be?

A. I don't know exactly when the haze started, I don't remember that day, but I know—All I know is it obstructed my view that morning.

The Court: That is all.

Mr. Myers: That is all.

Mr. Dunne: That is all.

Mr. Myers: May the witness be excused?

The Court: Yes. He may be excused, to return to his work.

Gentlemen, we have concluded with this witness.

Ladies and gentlemen, we are about to take an adjournment until 2:00 o'clock this afternoon. The Court admonishes you not to converse among your-

selves or with anybody else on any subject connected with the trial of the case or to form or express an opinion on it until the case is finally submitted. As you were told, when you return, go to the jury room and we will call you when we are ready to proceed.

(Recess was taken until 2:00 o'clock p.m.)

Afternoon Session, Wednesday, July 21, 1948,
2:00 p.m.

The Court: All right, gentlemen, proceed.

Mr. Myers: At this time, your Honor, I would like to read in evidence the deposition of H. J. Johnson, fireman; Mr. Dunne has agreed to read the questions and I shall read the answers.

The Court: Very well.

Mr. Dunne: There is no point in reading the preliminaries.

Mr. Myers: Yes, your Honor, if that is agreeable.

The Court: Merely summarize for the record that the deposition was taken at whose request and why he is not present and then proceed with the examination. Eliminate the preambles, the notations of the notary and so forth.

Mr. Myers: We start in at page 8.

Mr. Dunne: The deposition was taken by stipulation by the plaintiff of Mr. Johnson, who was originally named as a defendant, and the preliminaries were that counsel on both sides advised him as to what his rights were, his rights to make objections, and that we had to have his waiver of

signature to the deposition as well as our own consent to that. He consented to that and consented to the taking of the deposition.

Mr. Myers: That is correct, your Honor.

Mr. Dunne: The deposition shows that it was taken under 2055, your Honor. We do not concede at this stage of the case that [147] counsel is entitled to offer it under 2055. There is a recitation in the deposition to that effect. The case has now been dismissed as to this man.

Mr. Myers: He was a party defendant, your Honor, when the deposition was taken.

The Court: You are offering him as your witness and not as an adverse party because, you see, gentlemen, we are no longer governed by 2055; we are governed by 43(b), which is similar but would not cover a situation of a person who is not an adverse party or comes under the head of a managing agent so as to bind the party.

Mr. Myers: I think, your Honor, the preliminaries if read would show that Mr. Dunne and I had agreed upon that, that whatever the situation was at the time of trial we would let the Court rule accordingly.

The Court: Maybe I had better explain a little to the jury what is meant by 2055 and the other rule mentioned. We have a rule in the State and a similar rule in the Federal Courts, ladies and gentlemen, that you can call your adversary as a witness and then submit him to cross-examination and not be bound by his testimony. Ordinarily when a party offers a witness in evidence, that party is bound by his evidence, except under certain cir-

cumstances, but when you call an adversary, under one of these rules you are not bound by his testimony. You can call him and see what you can get out of him and then [148] you can contradict him if you want to. That applies, however, only to your adversary, a party who is your opponent in the law suit. If he is not an opponent in the law suit then, of course, you offer his testimony under the same condition as you offer the testimony of any other witness, that is, with the belief that his testimony is binding on you, except under certain circumstances, where you may impeach his testimony if you are taken by surprise by what he says and things like that. That is what counsel are referring to. This gentleman was a party to the action. The action now has been dismissed as to him, and therefore this testimony is offered by the plaintiff in support of their cause.

Mr. Dunne: This first part is an examination by Mr. Myers and I am reading the questions that Mr. Myers put and Mr. Myers will read the answers given by the witness.

The Court: All right.

(The deposition of H. J. Johnson was then read by counsel for the respective parties, during which the following exhibits were introduced):

Mr. Myers: Your Honor, we will offer this photograph in evidence as plaintiff's exhibit next in order, which counsel says is a photograph of the engine involved in the accident.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.) [149]

Mr. Myers: Do I understand counsel is not inquiring into the motives then?

Mr. Dunne: No, the only part of the impeachment is the statement which is attached to the original deposition, if Your Honor please.

The Court: All right. Now you may read the statement.

Mr. Dunne: May we have it detached and marked here?

The Court: I think you had better detach it. The jurors may want to see it and, as you know, we never send depositions out to the jury.

Mr. Myers: May I ask, your Honor, are there any other exhibits there besides the statement?

Mr. Dunne: I think just the photograph.

(The statement referred to was thereupon received in evidence and marked Defendant's Exhibit Q, after the marking of which it was read by Mr. Dunne.)

The Court: Call your next witness.

Mr. Myers: May I look at the deposition a moment, your Honor, and see what photographs are attached? There is just one and we have already put that in evidence.

Your Honor, either now or at your Honor's convenience I would like to pass that one photograph to the jury showing the engine that was involved in this accident.

The Court: Let us have another witness now

just before we take a recess. You can complete your case with your photographs. [150]

Mr. Myers: We can take up two or three matters. My next witnesses will be on an entirely different line. There are two or three matters I would like to bring up. One is with reference to the speed restriction which counsel and I have agreed upon, as to what the fact is. I do not know whether counsel is agreed that I am entitled to place the fact before the Court or not, but it is the company's own speed restriction.

The Court: I do not think it is a question of discussion, gentlemen. It is a question of instructions.

Mr. Myers: I want to offer that speed restriction of the company in evidence at this time.

The Court: Didn't you give an instruction about the regulations of the company?

Mr. Myers: Not including the speed restrictions, your Honor. That is a matter that is covered by company bulletin. It is not in the rule book, and it is a fact that we have agreed upon. Can we stipulate as to what speed restriction is?

Mr. Dunne: I can stipulate to the fact, but before that I make the objection that it is incompetent, irrelevant and immaterial. It might be material in an employee case but not as to an outsider who knows nothing about it.

Mr. Myers: It is material, your Honor, from the standpoint of the climatic conditions. I think when the case is fully presented the speed will be an important element in the case and that is why

we would like to show what that speed [151] restriction was.

Mr. Dunne: Our position is that the standard is fixed by law. It is a question of ordinary care, but whatever rules we may have adopted for our own internal management may be more or may be less than that standard.

The Court: If you will show me the bulletin, I will be glad to look at it and then I will determine.

Mr. Myers: Your Honor, we do not have the bulletin. It is a fact that there is a bulletin somewhere that covers the matter and counsel has agreed to it.

Mr. Dunne: If the fact is proper, I will agree to it.

Mr. Myers: So far as the rule of speed restriction or any other company rule not being admissible in this case, there is no question about the fact that the company rules apply for the benefit of the general public as well as the company employees themselves. There are authorities on that, your Honor.

The Court: It all depends on the rule. It all depends on the nature of the rule as to what the object of it is. There are no restrictions on railroads outside an incorporated city of the State of California, and I shall so instruct the jury. But, of course, they have to use the usual standard of care in determining the speed at which they pass.

The difficulty is, I may say, both of you are mixed in these instructions and have given me a problem with respect to [152] a lot of laws that

apply to street railways within cities and they have no application whatsoever here. We are not dealing with a city. We are dealing with a country crossing as to which there is no restriction in the law of California. The same applies to other matters that counsel for the defense has adverted to, such as responsibility for control and the like, persons riding in an automobile and so forth, which do not have application.

Mr. Myers: But, your Honor, the application of the speed restriction in this particular territory is fixed by time-tables.

The Court: I do not think any rules that they would have for their own guidance with the idea of covering so much territory have a bearing on this at all. The only question is whether there is any legal restriction, and there is no legal restriction. Both of you have prepared an instruction, and I am having them both copied; I am going to compare them, and they are so much alike I do not know which I will give. I may give one or the other. That being the law, I do not think any regulation applies. When it comes to bells, that is a different proposition. Then there is a duty to ring a bell and the method that you adopt is material, how to ring a bell, but that is different. Those company rules with regard to the manner of ringing the bell I shall give, but we are in a different field when we talk about the speed because there is no speed [153] regulation of a steam railroad by the law of the State of California. The only restrictions there are are those provided by municipal ordinances in large cities where the railroad passes

through the town, and as you know, in some of the cities like Los Angeles the railroads go through one of the very busy streets, Los Angeles streets. They still go through there, and we have regulations of speeds there and those would be material if an accident happened within the corporate limits of that municipality. This did not happen within the corporate limits of Modesto.

Mr. Myers: Will your Honor keep your mind open on that until I can produce the authority on that subject?

The Court: I have not ruled. My view at the present time is that it is not material. Before the case is over, if you will show me a case dealing with speed—I do not want any others——

Mr. Myers: Very well, your Honor.

Passing on to the next matter, your Honor, we have stipulated as to certain rules that do apply, that were in full force and effect at the time of the happening of this accident. The first is rule 14.

Mr. Dunne: We will reserve the objection that it is incompetent, irrelevant and immaterial.

The Court: What does that relate to?

Mr. Myers: Rule 14 has to do with the type of whistle [154] that is to be blown at the railroad crossing.

The Court: You have covered that by an instruction. I think it is much better to let me handle it by an instruction than to offer evidence of it. Then the jury will have it before them because, as you know, all my instructions are written and then if I send them out they will have them in the form in which they are written.

Mr. Dunne: Severally as to each of the proposed rules our objection is they are incompetent—

The Court: Have you a copy of the instruction? I am sorry, gentlemen. My instructions are in the hands of secretaries who are copying them.

Mr. Myers: I have all five rules here, your Honor, that I would like to put in evidence. I have submitted an instruction on them, and those are all rules that apply to this particular case. [155]

The Court: I will say right now I will not give 864 or 874. They have nothing to do with the matter, as there is no showing that any outsider had anything to do with the operation of the engine, so as to bring any such rule into play, but I am inclined to think in view of the fact that a whistle is required to be blown by law the regulations going into detail are material. They don't have the importance, for instance, as that what you call the rules of the road, that the Maritime Law have; it is between ships at sea.

Mr. Dunne: They have the force of law, your Honor.

The Court: They have the force of law. Also the man who hears them knows what they mean. They are like a wigwag signal given by a man in the signal corps. The man to whom he gives it knows what it means. Nevertheless, they are material, showing that the company recognizes the obligation and specifically calls attention of the company. However, if you want—

Mr. Dunne: If your Honor please, we will make the formal objection that they are incompetent, irrelevant, and immaterial.

The Court: That's right. However——

Mr. Dunne: And not evidentiary matter.

The Court: I will say this: If I give them—I have not seen the instructions as a whole, but when I see them it may well be when I give this as an instruction I will modify [156] it. That is, ultimately, in a case like this, the question whether he gave the proper signal, it is not that question in a case like this. The question is, did he give it, or did he not give it? In other words, if he gave one instead of two it is not material, unless by giving two he could have avoided the accident.

Mr. Myers: I agree with that.

Mr. Dunne: I was about to say we will make an objection it is incompetent, irrelevant, and immaterial, but will stipulate that the showing may be made as far as the evidence is concerned of the three rules that counsel on the other side has suggested that your Honor give instructions——

The Court: All right. You can cut off the top of the paper and the bottom of the instruction and I will allow you to either put it in as an exhibit or read it to the jury, rules 14, 30 and 31.

Mr. Myers: Thank you, your Honor.

The Court: I will amplify later on the instructions. I will repeat now what I have said, and counsel agrees, that the important part of this case is whether it was given or not given, and not so much whether he gave one instead of two, unless the evidence shows that by giving a single signal the warning might have been heeded. You may be satisfied from the evidence that regardless of

whether it was given, or not, because somebody said he didn't hear it he wouldn't [157] have heard it, or that it should have been louder. That is up to you to determine. I am merely commenting on the materiality of these particular rules.

Mr. Myers: I will just read the rules into the record. Rule 14 of the Transportation Department, Southern Pacific Company, in full force and effect at the time of the happening of this accident provided as follows:

“Rule 14: A whistle of two long, one short and one long blast will be sounded when ‘approaching public crossings at grade, tunnels and obscure curves; to be commenced sufficiently in advance to afford ample warning but not less than $\frac{1}{4}$ mile before reaching a crossing, and prolonged or repeated until engine has passed over the crossing’.”

“Rule 30: The engine bell must be rung when an engine is about to be moved; while passing through tunnel; while approaching public crossings at grade, beginning sufficiently in advance to afford ample warning, but not less than $\frac{1}{4}$ mile before reaching such crossing; and continuing until the engine has passed over the crossing; and otherwise when necessary as a warning signal.”

“Rule 31: The whistle must be sounded at all places where required by rule or law or to prevent accident.”

The Court: I think we better take a short recess now and then we will call the other witnesses.

(Recess.) [158]

The Court: Proceed.

Mr. Myers: Mrs. Geraldine Souza, will you step up, please?

GERALDINE SOUZA,
one of the plaintiffs, called in her own behalf;
sworn

The Clerk: Will you state your name to the court and jury?

A. Geraldine Souza.

Direct Examination

Q. (By Mr. Myers): Where do you reside, Mrs. Souza? A. In Modesto.

Q. How old are you? A. 22.

Q. How old were you in August of 1945?

A. 20.

Q. I am sorry—August, 1946. A. 20.

Q. You were 20 years old; is that right?

A. Yes.

Q. In other words, you were 20 years old when your action was filed; is that correct?

A. That is correct.

Q. During his lifetime, what was your husband's name? A. Edward. [159]

Q. Edward what? A. Anthony Souza.

Q. Edward Anthony Souza. He was involved in an accident on October 11, 1945; is that true?

A. That is correct.

Q. Prior to that time, Mrs. Souza, what was Mr. Souza's occupation?

A. Well, he had a ranch, about 40 acres in alfalfa, and then he ran a hay press.

(Testimony of Geraldine Souza.)

Q. He had this hay press business; is that right? A. Yes.

Q. When and where were you married, that is, you and Edward Souza?

A. In Manteca, in October—Pardon me, March.

The Court: Speak a little louder.

A. In Manteca, March 18, 1943.

Q. (By Mr. Myers): After you were married in March, 1943, you went to live where?

A. At his folks' home.

Q. That was at the ranch near Modesto, is that correct? A. Yes, sir.

Q. Were there any minor children the issue of this marriage? A. Yes.

Q. Will you just give their names and ages, please?

A. Well, Lawrence is 4 and Richard is 3. [160]

Q. At the time that this accident happened how old was Lawrence? A. Two.

Q. Two years old. Is Lawrence a perfectly healthy child? A. No, sir.

Q. Just tell us about him.

A. Well, he is totally crippled.

Q. Totally crippled? A. Yes.

Q. Was that because of some accident in birth?

A. Yes, the doctor injured him at birth.

Q. Is his condition that known as spastic paralysis? A. Yes.

Q. Because of that fact he has required more care than the other child? A. Yes.

Q. During your husband's lifetime what, if anything did he do with reference to helping take care of that child?

(Testimony of Geraldine Souza.)

A. Well, he cared for him practically the time he was home when he wasn't working on the hay press. He helped, always helped with the baby when he was home, especially at night.

Q. Has this child ever been able to get around? In other words, under his own locomotion, at all?

A. By rolling on the floor, is all.

Q. By rolling on the floor? [161]

A. Yes, sir.

Q. Are there any artificial braces of anything of the sort the child wears?

A. Last week he got braces, but he can only have them on for a half an hour a day.

Q. During this whole period of time, Mrs. Souza, has he been able to get around at all except either by your husband's help when he was alive, or your own help?

A. He has never been able by himself, no.

Q. Do you know approximately what your husband's earnings were up to October 11, 1945?

A. From \$250 to \$350 a month.

Q. Of that how much, if any, did he spend or give you for the support of yourself and your minor children?

A. Practically all of it.

Q. What would be your best estimate as to the amount he actually gave you for your support and for the children's support.

A. At least 90 percent.

Q. Of what? A. His earnings.

Q. Of from \$250 to \$350 a month?

(Testimony of Geraldine Souza.)

A. Yes; it varied.

Q. Would that be a fair estimate through the years that you were married? [162]

Q. From the standpoint of the other children, or the other child, rather; the other child is a boy, too?

A. Yes.

Q. And a perfectly normal baby?

A. Yes.

Q. Your spastic child, does that child require considerable more care than the other child?

A. Yes.

Q. Do you know what the future is going to be with reference to caring for that child?

A. Well, they are doing a lot for the spastic children, and I am hoping there is a lot can be done for him, yes.

Q. Does that entail any expense?

A. Definitely.

Q. What do you do in that regard? Do you send the child to a school, or something of the sort?

A. Well, yes, they have to be under physicians and trained nurses care for at least three years.

Q. What does that cost, monthly, in order for that?

Mr. Dunne: It is a question of benefits from the father, not needs.

The Court: Read that question, please.

(Question read by the reporter.)

Mr. Myers: My point, I want to prove what the cost of the special training for this spastic child would be, that [163] it was such care that her husband would have afforded had he lived.

(Testimony of Geraldine Souza.)

The Court: I don't think you can go into the cost. You can describe what is needed, but you can't go into cost, because you are going into a realm of speculation dependent upon the——

Mr. Myers: Very well, your Honor.

The Court: As to what is necessary in the future, they may get it for nothing; they might get it for a lot of money. In that event it is not a material matter in a case like this. In other words, they are entitled to recover, assuming that there is a recovery, the jury has a right to consider the rights they would have got from the support of the husband within the limitation of his earning possibilities.

Mr. Myers: All right, your Honor.

Q. In any event, in order to develop this child to a point where you can get the best out of him, in view of his condition, I mean from the standpoint of his being able to do anything in the future, he must have this medical supervision; is that the point?

A. That is the point.

Q. And they do have school, a medical school, or whatever you want to call it, for that purpose, is that true?

A. That is true.

Q. Now, Mrs. Souza, how did you and Edward Souza get along [164] during your lifetime.

A. Wonderfully.

Q. Was he a good family man?

A. Yes, very good.

Q. At night time did he go out or did he stay home and help you take care of the children?

(Testimony of Geraldine Souza.)

A. No; he always stayed home.

Q. When he did go out did he go out by himself? A. No.

Q. You went with him? A. Yes.

Q. What else around the home did he do, if anything?

A. Well, if I was taking care of the baby he would do all my housework, and if I was doing the housework he would take care of the baby.

Q. You were happy with your husband, were you? A. Very happy.

Q. He was happy with you? A. Yes.

Q. Did you love your husband?

A. Very much.

Q. Did he love you? A. Yes.

Q. With reference to the funeral expenses, I have a bill here, Mr. Dunne—pardon me, your Honor, except that I would like [165] to submit the bill to Mr. Dunne through your Honor, and I think we can stipulate to it.

Mr. Dunne: If you will state the amount I will accept your statement.

Mr. Myers: The bill is in the sum of \$1047.38. Those were the funeral expenses? A. Yes.

Mr. Myers: That's all.

Cross-Examination

Q. (By Mr. Dunne): Mrs. Souza, you said your husband turned over, did he, to you about 90 percent of his earnings? A. Yes.

Q. Then you used those for general household purposes? A. Yes.

(Testimony of Geraldine Souza.)

Q. For the care of the family?

A. For the whole family.

Mr. Dunne: No further questions.

Redirect Examination

Mr. Myers: Just a moment, your Honor. There is another question.

Q. The last time you saw your husband alive was when?

A. Oh, before nine o'clock, when he left the ranch.

Q. On October 11th?

A. On October 11th. Oh, no. I saw him arrive at the hospital—I am sorry—but he did not recognize me.

Q. Before the accident, then, you saw him where? [166]

A. Before the accident?

Q. Yes.

A. I saw him at home.

Q. Do you know where he was going that morning?

A. He was going with Johnny.

Q. He was not going to town?

A. Johnny wanted him to see the ranch; he wanted him to look at a ranch and Johnny asked him to go along.

Q. So he went; is that it?

A. Yes.

Mr. Myers: That is all.

Mr. Dunne: No further questions.

The Court: Step down.

MRS. JOSEPHINE SOUZA,

one of the plaintiffs, called in her own behalf;
sworn

(Testimony of Mrs. Josephine Souza.)

The Clerk: Will you state your name?

A. Mrs. Josephine Souza.

Direct Examination

Q. (By Mr. Myers): Mrs. Souza, how old are you? A. 52.

Q. On October 11, 1945, how old was Mr. Souza, that is, Antonio Azevedo Souza? A. 57.

Q. What? [167] A. 57.

Q. Where was he born, do you know?

A. He was born in the Azores.

Q. When? A. In 1888.

Q. Do you know when he came to this country?

A. Came as a boy; I don't remember what age; around 17, I think, or 18. I don't know exactly.

Q. Where were you born?

A. I was born in Piedmont.

Q. Here in the East Bay? A. Yes.

Q. When and where were you and Mr. Souza married? A. In Modesto.

Q. When? A. In 1919.

Q. Then where did you make your home after your marriage? A. In Modesto.

Q. Have you lived on a ranch practically during your entire married life? A. Yes.

Q. How many children did you have?

A. Six.

Q. Six children that were born out of this marriage: Is that right? [168] A. Yes.

Q. Will you start in with the oldest one and go down and give us their names and their ages, please, Mrs. Souze? The first one was who?

(Testimony of Mrs. Josephine Souza.)

A. Their ages now, or at the time of the accident?

Q. Give us their ages at the time of the accident.

A. Edward was 24.

Q. That is Edward Anthony Souza?

A. Edward Anthony Souza.

Q. He is the son that was also killed in this accident in which your husband met his death?

A. Yes.

Q. He was 24 at that time? A. Yes.

Q. Who was the next? A. Mary Adele.

Q. Mary Adele. What was her age at that time?

A. She was 22.

Q. 22 years old. The next child was who?

A. John; John was 19.

Q. John, the young man who is in court with you? A. Yes.

Q. He was 19 years old then? A. Yes.

Q. Who was the next one? [169]

A. Lucille; she was 17.

Q. Then the next one?

A. Then James was 16.

Q. James was 16?

A. And Benjamin was 9.

Q. He was the youngest? A. Yes.

Q. At the present time how many of them are minor children, right now? A. Three.

Q. That is Benjamin, James——

A. And Lucille.

Q. And Lucille? A. Yes.

Q. These children all live with you, do they?

(Testimony of Mrs. Josephine Souza.)

A. Yes.

Q. Now, Mrs. Souza, at the time of your husband's death where were you living?

A. In Modesto.

Q. What? A. Modesto.

Q. Still living at Modesto, were you?

A. Yes.

Q. And on what ranch?

A. Well, it was on the Toomes Road. [170]

Q. How long had you lived on that ranch?

A. Now, or before the accident—living there 20 years.

Q. Before the accident you had lived there 20 years or 18 years? A. 18.

Q. You lived there 18 years before the accident; is that right? A. Yes.

Q. Mrs. Souza, you and your husband and your entire family lived there? A. Yes.

Q. What was your husband's occupation?

A. He was a dairyman.

Q. Do you know what his average monthly earnings were before October 11, 1945?

A. About \$300 a month.

Q. Of that amount of money what portion of it did he give you to afford you with your support and maintenance as well as that of the children?

A. About one-third.

Q. What? A. Two-thirds.

Q. Two-thirds of that amount? A. Yes.

Q. Was Mr. Souza a man who stayed home, or did he go out, or what was the situation.

(Testimony of Mrs. Josephine Souza.)

A. He stayed home. [171]

Q. Did he go out without you?

A. Very seldom, except on some business when I was not needed, and I had so much to do at home with the children I had better stay home.

Q. When he went out socially did he go with you? A. I always went.

Q. Was Mr. Souza a good family man?

A. He was, very much so.

Q. Besides his ranch activities did he do anything around the home, at all?

A. Yes, he did.

Q. How did you and Mr. Souza get along?

A. Happy.

Q. Mrs. Souza, as a result of his accident, I have a bill here from the Sovereign Funeral Home in the sum of \$1157.38. Is that a bill which you incurred as a result of this accident for burial services for your husband? A. Yes.

Q. Mrs. Souza, did you love your husband?

A. Yes.

Q. Did he love you? A. Yes.

Q. Do you miss him? A. I do.

Mr. Myers: That is all. [172]

Cross-Examination

Q. (By Mr. Dunne): Mrs. Souza, the two-thirds of the \$300 a month that your husband gave you, you used that, then, for the benefit of the whole family, I take it? A. Yes.

Q. Did you own that ranch? A. Yes, sir.

Q. The \$300 a month that you used, that was the return from the operation of the ranch?

(Testimony of Mrs. Josephine Souza.)

A. Yes.

Q. You still have that ranch? A. Yes.

Mr. Dunne: No further questions.

Redirect Examination

Mr. Myers: Your Honor, I am sorry, there is just one or two other matters that we might determine while the witness is on the stand.

Q. You were in court when Mr. Davis, Oran Davis, testified; when he testified concerning the accident you were in court? A. Yes.

Q. You heard him say that he was contacted by Mrs. Souza. A. Yes.

Q. You were the Mrs. Souza who contacted him? A. Yes.

Q. How did you happen to contact him; when did you know about him? How did you come to know about him? [173]

A. Well, the daughter-in-law where he was employed knew my daughter.

Q. What is her name?

A. The daughter-in-law?

Q. Yes. A. Mrs. Freeman.

Q. That is at the Freeman Dairy, where Mr. Davis worked? A. Yes.

Q. Go ahead.

A. She told my daughter that this man that was hired by her father-in-law told them about the accident, that he saw it.

Q. Then you got in touch with him

A. Yes.

Q. How long was that before or after you saw me for the first time?

(Testimony of Mrs. Josephine Souza.)

A. A few months, I guess; I don't remember.

Q. Three months before you ever saw me?

A. Something like that.

Q. That is how you happened to contact him?

A. Yes.

Q. Was it at your request that he appeared in this case to testify? In other words, you requested his presence, did you? A. Yes.

Mr. Myers. That is all. [174]

Recross-Examination

Mr. Dunne: I neglected to ask you one question. Is your daughter, Mary Adele, married?

A. No, she is not.

Q. How about your daughter Lucille?

A. She is at home. She just graduated from high school.

Q. She is not married, either? A. No.

Mr. Dunne: Thank you.

The Court: Step down. [174-A]

Mr. Myers: I think there is a matter I should ask Mrs. Souza about, but I can recall her. Pardon me, your Honor. You know, you get in a bad habit in the state courts.

The Court: If I come here often enough, I will cure you of it.

Mr. Myers: I would like to ask counsel through your Honor——

The Court: However, I want to say this. I was in the state courts for eight years and that method was not used in my court. In other words, I conduct a court now the way I conducted it in 1927

and 1928 when I first became a judge of the Superior Court. It is just different methods that different judges allow.

Mr. Myers: I was before your Honor in 1927.

The Court: I presume you tried your first case before me.

Mr. Myers: That is right. I would like to ask your Honor and counsel if he expects to call Mr. Aguers.

Mr. Dunne: I do.

Mr. Myers: In view of that, your Honor, if you will step back up, Mrs. Souza, I will ask you one or two questions regarding that.

JOSEPHINE SOUZA

was recalled as a witness and having been previously duly sworn, testified as follows: [175]

Redirect Examination—(Resumed)

Q. (By Mr. Myers): Mrs. Souza, do you recall on some occasion a Mr. Aguers from the Southern Pacific Company, claim agent for the Southern Pacific Company, came to your home?

A. Yes, I do.

Q. Do you know how long after the accident that was? A. Just a few days.

Q. When he came to your home, will you tell His Honor and the jury what, if anything, was done at your home with Mr. Aguers?

A. Well, he wanted my son to give him a statement, and he told him that he didn't care to discuss the matter at that time, and he said that he knew how he felt, that he lost his own dad when he was a boy, and so he would come back later, in about

(Testimony of Josephine Souza.)

Q. He never did come back, and was there any statement written in your presence?

A. No, sir.

Q. What is that?

A. No, sir, there was not.

Q. And were you present at all times when Mr. Aguers was present? A. Yes, sir.

Q. And when Mr. John Souza, your son, was present? A. Yes, sir.

Mr. Myers: That is all. [176]

The Court: Any questions, Mr. Dunne?

Mr. Dunne: I have no questions, no, your Honor.

Mr. Myers: Other than the matter of the speed restriction, your Honor, we rest.

The Court: What do you mean by the matter of speed restrictions?

Mr. Myers: You will remember I offered in evidence the speed restriction that I am going to try to give your Honor some authorities for my position.

The Court: If you find any authority, I will reopen the case to allow that. For the present I will rule it is not material because of the state law.

Mr. Myers: With that, your Honor, the plaintiff rests.

(Plaintiff rests.)

Mr. Dunne: If your Honor please, I have a motion to make.

The Court: All right, you may make it right here and we will not bother the jury.

(Thereupon counsel for the respective parties and the Reporter approached the bench, and outside of the hearing of the jury the following occurred:)

Mr. Dunne: In each of the matters of Angelo and John Martin Souza and the death of the father Antonio Azevedo Souza, in those two cases we make a motion of dismissal and non-suit on the grounds, first, that the evidence shows contributory negligence on the part of John Martin Souza, the son, and under [177] the provisions of the Motor Vehicle Code of the State of California, he being a minor and having his father's consent, his negligence is imputed to the father, so that any negligence on his part as far as recovery upon the ground that he failed to exercise proper care in looking or listening for an approaching railroad train, and upon the ground that there is no showing of any negligence upon the part of the defendant.

The Court: I think the matter presents a factual situation for the solution of the jury. I may say I think this is the third one of out 12 I have ever allowed to go to the jury, but I am satisfied that so far as the question of negligence is concerned, it presents a factual situation as to whether he stopped or not, and there is testimony that he did stop, and there is testimony that the bell did not ring and the whistle was not blown, and that, *prima facie*, is sufficient to take the case to the jury.

As to the other matter, I will discuss it more fully. It relates to the matter of instructions. But

the showing is that this was his automobile, and as he had no license, his father did not sign any agreement.

Mr. Dunne: There are two Code sections: One is the signing of the agreement, the other is permitting him to drive with the parents' consent.

The Court: But that was the boy's own car, not the father's car. [178]

(Discussion off the record.)

The Court: The motion for dismissal is denied.

(The following proceedings were had in the presence and hearing of the jurors:)

The Court: I may explain to you we are not keeping anything away from the jury, but there are all manner of matters that are supposed to be taken up between court and counsel. For instance, before the arguments are made, we may have to take an hour to discuss the proposed instructions because I am supposed under the law to let them know what I am going to do about certain instructions that both sides suggest, so that they will know before they argue. You will have to wait until we get through with that. You have a province and I have a province. I can't invade yours and you do not dare invade mine. So this method is easiest, rather than sending you out and bringing you back, so many times we go into a huddle and dispose of these matters so that counsel may place upon the record the first matters that are supposed by law to be done at certain times, otherwise they can't question them later on.

Mr. Dunne: If your Honor please, I should like to ask counsel whether he is willing to stipulate that Engineer Glanville died last November.

Mr. Myers: That is my understanding. I will take your word for that.

Mr. Dunne: Secondly, I offer in evidence two other [179] photographs of locomotives 2487. Those are the ones I referred to when I handed the first one to counsel on the other side.

(The photographs referred to were thereupon received in evidence and marked Defendant's Exhibits R and S.)

BERNARD GEORGE AGUER,
was called as a witness on behalf of the defendant,
and being first duly sworn, testified as follows:

The Clerk: What is your name, sir?

A. Bernard George Aguer.

Direct Examination

Q. (By Mr. Dunne): Mr. Aguer, what is your business?

A. I am employed as a claims adjuster by the Southern Pacific Company, sir.

Q. Located where?

A. At the present time at 65 Market Street, San Francisco.

Q. In October of 1945 what was your business?

A. I was employed as a claims adjuster by the same company, field man.

Q. Where were your headquarters at that time?

A. I was what was called a Western Division man. I worked out of Oakland.

(Testimony of Bernard George Aguer.)

Q. Did you have occasion to make some investigation, without stating what it was, in connection with a crossing accident at the crossing of Beck-with Road just northwest of Modesto and the [180] Southern Pacific tracks, an accident that occurred on October 11, 1945? A. I did.

Q. Did you, in that connection, call at the home of the family, some of whose members were involved in that accident? A. I did.

Q. When was that that you called there?

A. Approximately a week or better after the accident.

Q. Did you make any note or memorandum of anything that occurred upon that visit?

A. I took a statement from the young chap, the driver of the car that was involved in the accident.

Q. Let me show you Defendant's Exhibit K for identification. So far as the ink handwriting on that is concerned, whose is it?

A. That is my handwriting, sir, my signature.

Q. So far as the ink writing is concerned, if you will look at all six pages, is that all in your handwriting? A. Yes, sir, I wrote that statement.

Q. I call your attention to the fact that each page—I believe I am correct in making this statement—bears the signature as a witness; is that your signature? A. Yes, sir.

Q. Each page also bears a date, I think the date October 21, 1945. Did you put that on there?

A. I did. [181]

Q. When did you put that date on there?

A. At the time that I took this statement.

(Testimony of Bernard George Aguer.)

Q. Was that the date of the statement? Was that the same day that you took the statement that you dated it? A. Yes, sir.

Q. In other words, that is correctly dated?

A. Yes, sir.

Q. About what time did you arrive at the Souza home?

A. I don't recall exactly. It was in the morning, I believe.

Q. When you called there what, if anything, did you say of identifying yourself?

A. Well, I introduced myself and I believe I gave them my card and informed them what purpose I was there for, to investigate the accident and take a statement from Mr. Souza, the driver of the car.

Q. To whom did you identify yourself and make your presence known?

A. Well, Mrs. Souza was there.

Q. Which Mrs. Souza was that?

A. As far as I recall, I do remember distinctly meeting the mother of the driver of the car, Mrs. Souza.

Q. Is that the Mrs. Souza who sits in the middle here?

A. I believe so. I imagine it is. I can't recall her face exactly after this length of time.

Q. At any rate——[182]

Mr. Myers: Just a minute, your Honor. I will ask that the answer be stricken out. He says he imagines. Whatever he imagined we will ask be stricken out.

(Testimony of Bernard George Aguer.)

Mr. Dunne: All right, we will let that go out.

The Court: You can say that you think a thing happened but you can't say you imagine. In other words, you are not required to be more positive than you can, but you can't speculate.

The Witness: Yes. Well, at the time I called at the Souza home, I met a Mrs. Souza who identified herself as being the mother of the boy.

The Court: Q. Do you recognize her as the lady who just testified a while ago?

Mr. Dunne: He was not here when she testified. The witnesses were excluded.

The Court: Oh, I beg your pardon. I forgot.

Q. Do you recognize her in the courtroom, the older of the two ladies sitting there? Stand up, Mrs. Souza, will you, please? Do you recognize her?

A. I am quite sure that is the woman.

The Court: All right, you may be seated.

Q. (By Mr. Dunne): During the course of any conversation who else was there, Mr. Aguer?

A. The son, her boy, who had been driving the car, young Souza, and I believe there was also a sister-in-law. [183]

Q. Were all three of these people present during the course of the conversation?

A. Yes. I am definite with the mother and the son because I spoke to them both. I remember distinctly the mother and the boy, of course, was there, because I took the statement from him.

Q. Did you enter the house? A. I did.

Q. When you entered the house, please tell us in your own way what happened, without now stat-

(Testimony of Bernard George Aguer.)

ing what was said, but tell us how the statement was taken and what was done.

A. Well, as I say, I called and I properly introduced myself as being with the Southern Pacific Railroad Company, and the fact that I was there to investigate the accident and find out what had occurred. I wanted to take a statement—I was interested in taking a statement from the son, the boy who had been driving the car at the time, and I was ushered into the house by Mrs. Souza, and I spent considerable time there.

As I recall, I was asked to be seated and sat down at a table there and I believe it was the dining room of the house. The boy was there and gave me his statement. His mother was right there and, as I recall, there was another woman, a younger girl, who was sitting off in possibly what might be considered the front room of the house there. And we had a very pleasant—as much as possible—a very pleasant meeting there, during which [184] time I took this statement from Mr. Souza. And, as I recall, I believe he was a minor at that time, and for that reason I believe I explained to Mrs. Souza I wanted her to read the statement because I was going to ask her son to sign the statement.

Q. Tell us how you got the statement. The jury would be interested in the mechanics. What did you do?

A. Well, I simply asked the various questions I normally ask relative to the incident and he answered them, and I just put his answers down

(Testimony of Bernard George Aguer.)

and wrote this statement, which is the statement here. That is all there was to it.

Q. Is the paper that you hold in your hand, Defendant's Exhibit K for identification, the paper that you wrote at that time? A. Definitely.

Q. And at the Souza home? A. Yes, sir.

The Court: I haven't seen the statement. That is not in question and answer form. It is merely the substance of what he was telling you?

The Witness: Yes, that is true.

The Court: Q. Is it written in the first person? Does it say "I did so-and-so"?

A. Yes, it is.

The Court: Go ahead.

Q. (By Mr. Dunne): So far as that statement is concerned, did [185] you at that time, at least in so far as you had capacity to do it, put down there accurately what you were told?

A. Yes, sir.

Q. Did you get the information that is in there from the young man, John Souza?

A. Yes, sir.

Q. Did you put anything in there yourself? Did you interpolate anything yourself, anything in addition to what you were told by John Souza?

A. No, sir.

Q. After that was written, then, you completed it, what then did you do?

A. Well, as I say, I had Mrs. Souza read the statement, which she did and told me that it was all right and, of course, she had been present when

(Testimony of Bernard George Aguer.)

her son had given me the statement, and I had her son read the statement, but, as I recall—well, it was Mrs. Souza who made an objection there that she didn't care to have her son sign it nor would she sign it because, as she stated there, she didn't feel it was the thing to do from her standpoint. She wished to see an attorney. That was her words—"I intend to see an attorney. Before I sign anything, I wish to see an attorney."

Q. After the son read it over, did he make any comment?

A. I asked him, which is customary, if the statement were true and correct to the best of his knowledge and belief, and he told [186] me, "Well, that's it."

The Court: Q. Did you ask him to sign it?

A. Yes, sir, I did.

Q. What did you say to him?

A. Well, as I recall, I remember distinctly asking Mrs. Souza, in deference to her, because of the fact that the boy, as I say, I believe was a minor at the time, and Mrs. Souza simply stated that she didn't wish to have the boy sign the statement and she wouldn't sign it herself.

Mr. Dunne: If your Honor please, we offer this in evidence with an exception: there is some matter that I called to the attention of counsel upon the other side and it is agreed between us that it has no bearing on this matter. Is that correct?

Mr. Myers: Well, that is right, but, your Honor, we object to the statement itself on the ground

(Testimony of Bernard George Aguer.)

it is incompetent, irrelevant and immaterial. He can state what conversation he had at that time and place and the persons present, but any purported written statement that is not signed and which the plaintiffs have stated they have never even seen before, before coming to court today, it is incompetent, irrelevant and immaterial to put that in evidence. As far as the conversation is concerned, that is a different matter.

The Court: This is more than a memorandum. This is not used merely to refresh his recollection. This is used as primary evidence of what a person told him and what he put down. [187] Now, of course, that person has denied it. It is up to the jury to determine which version of the transaction they will believe, but this statement is admissible under the facts given by the witness.

Mr. Myers: All right.

Mr. Dunne: If your Honor please, that part referred to I have marked in pencil and will omit.

The Court: Do you want to read it?

Mr. Dunne: I do want to read it because of that part that is to be omitted.

The Court: We can cover it up if it is sent out to the jury as an exhibit.

Mr. Dunne: Yes, your Honor.

The Court: I will instruct the Clerk to cover up the portion. We have a way of placing a paper across in a manner that the jurors can't see it without destroying a seal. They usually don't anyway.

(Testimony of Bernard George Aguer.)

Mr. Dunne: And that part of it, if your Honor please, I have enclosed with pencil.

The Court: All right.

Mr. Dunne: Shall I read it now?

The Court: Well, if you have finished with this witness——

Mr. Dunne: I had finished with the witness.

The Court: All right.

Mr. Dunne: This again is on a form partly printed and [188] partly written:

“Statement of John Martin Souza.

“Home address: Rt. 3, Box 633, Toomes Road, Modesto.

“Occupation Dairy Farmer. Employer Self employed.

“Business address: same.

“What day and what hour did accident occur? October 11,—about 9:15 a. m.

“Where did accident occur? At intersection of Beckwith Road and Southern Pacific Railroad Crossing.

“Where were you when accident occurred? (Blank.)

“Do you know anyone who saw accident? Please give names and addresses. No—but we expect to uncover witness.

“Did you witness accident? Involved.

“Give full account of your knowledge of accident. “I am the legal and registered owner of the automobile involved in the crossing accident, at Beckwith Road and Southern Pacific right of way,

(Testimony of Bernard George Aguer.)

which occurred about 9:15 in the morning of October the 11th 1945. The automobile was a 1941 Ford Coupe, license number 93H838. On the morning of the accident I left my house on Toomes road to drive to Dry Creek; to look at a dairy ranch. It was about 9:00 o'clock in the morning when we left our house. It was a nice clear dry morning. I was driving the automobile, and my brother Edward was sitting next to me in [189] the middle of the seat, my father Anthony Souza, was sitting on the right side of the seat. When we left the house, I drove south on Toomes to Beckwith Road. When I reached Beckwith Road, I turned to my left and was driving East, on Beckwith Road. I had the window on my side rolled all the way down, and my father had his window on the right side of the automobile rolled halfway down. I had a radio in the automobile, but it was turned off, and not playing. I was driving along Beckwith Road about 40 miles an hour, and my father and Edward and I were talking about various things. As I drove East on Beckwith Road, I approached the Southern Pacific Railroad tracks crossing Beckwith Road, just before you reach the highway. When I was about 100 to 150 yards away from the crossing I looked for a train. I was slowing up and driving about 30 miles an hour at that time. When I looked for a train, I looked through the windshied. I never seen any train. I did not notice my father or brother looking for a train at that time. They were not saying anything, just riding along quietly. At that

(Testimony of Bernard George Aguer.)

point in the road as I looked, there was a walnut grove on my left, and on my right, running along the road was a fence, covered with grapes. I could see over this grape vine covered fence, but I did not see any train. We were still moving down Beckwith, towards the crossing, and I am slowing up all the time. When I get [190] about 40 yards from the crossing, I look again through the windshield, to my right and to my left. I usually look carefully to the left a couple of times, because of the walnut grove there, at this point I was doing about an estimated 20 miles an hour. The fact that my brother and father were in the seat with me did not bother my vision, the seat was adjustable, and I had it moved back. I could see alright. I did not see anything. I did not hear any train whistle or bell, or hear any train; at this time I still had the fence on my right, but could see over the fence O. K. I kept driving towards the crossing, there was no other automobile, ahead of me, and there was no automobile coming towards me, the road was all clear. I was not talking to my father or my brother, and they were not talking. When I got about 10 feet from the crossing I was slowed up to about 8 miles an hour. I still had not heard any bell or whistle, or seen any train. My father and my brother did not say anything to me, they never did say anything if either one of them ever did see the train they never did say anything about it. Neither one of them ever said a word, nothing! Not even "Look out," even when we were hit! About

(Testimony of Bernard George Aguer.)

this time I was just going onto the tracks, and was doing about 5 miles an hour, I was shifting from high to second gear, and looking straight ahead. I still had not seen any train, or heard any whistle or bell. It was quiet, along [191] through there, no excessive noise, from any tractor or truck, or pump in the fields, just a quiet morning. When I was right on the tracks something caused me to look up to my right, I do not know what, maybe the noise, or something anyway I looked up, and saw the engine, a couple of feet away, and before I had a chance to do anything the engine hit me. That's the last I remember, I was knocked out. I do not know how fast the engine was going when it hit me. My father and brother never said a word to me. I never, at no time, heard the train whistle or bell and I never did see the train (engine), till it hit me (just a second before it hit me.) The engine hit me on my right side, just where I do not know, I have not seen my automobile yet. The accident happened because I did not see the engine, and did not hear any whistle, or bell. The engine was hard to see because it was traveling alone (pulling no cars); if it was pulling cars, I could have seen it. I think when I looked that the engine was probably in that blind spot on the right corner of my windshield, where the door joins the windshied there on the corner of the automobile that partition there on the corner. I do not think that the man on the engine blew the whistle. I never did hear any whistle. I bought my automobile in March, and had

(Testimony of Bernard George Aguer.)

been waiting for my father and mother to go into town with me for my driver's license. I do not have a driver's [192] license. I had taken out a driver's permit, but I lost it.

"Have you read this statement on 6 pages and is it true and correct, to the best of your knowledge and belief? (Blank.)

"I witnessed my Son, John Martin Souza, read this statement of his, and he states that it is true and correct, to the best of his knowledge and belief. I also read the statement. (Blank.)

"Dated Oct. 21, 1945.

"Witness: B. G. Aguer.

"Signed: (No signature)."

Mr. Dunne: I have no further questions.

The Court: All right, cross-examine.

Cross-Examination

Q. (By Mr. Myers): This is entirely in your own language, is it not, Mr. Aguer?

A. No, I wouldn't say that. I always put down in the statement as much as possible in the person's language, just as the person tells it to me.

Q. Whose language is that?—"I witnessed my son, John Martin Souza, read this statement of his and he states that it is true and correct to the best of his knowledge and belief. I also read the statement." Whose language is that?

A. Well, I wrote that down. [193]

Q. It is your language, isn't it?

A. Mrs. Souza witnessed the boy giving the statement.

(Testimony of Bernard George Aguer.)

Q. Just answer the question, please. Isn't that your language.

A. Well, I wrote that statement down.

Q. Yes, it is your language. It is not something someone told you?

A. No, that is true, I wrote that down.

The Court: Q. In other words, the portion counsel has just read is the attestation clause which you usually put in and you wrote that down; nobody spoke those words?

A. That is true, but before I put that down, sir, I asked Mrs. Souza the question, Mrs. Souza gave me the answer, and then I put that statement down.

Q. She said, "I witnessed my son, John Martin Souza, read this statement"?

A. She witnessed her son give that statement and was true and correct to the best of her knowledge and belief.

Q. Is it your testimony that that statement at the bottom of the larger statement was not written at the same time as the other pages in that statement?

A. That was put down directly at the conclusion of the statement there. When I took the statement I put that down.

Q. In other words, according to you, when you got through writing you came down to the last page and left a blank, and then you wrote this in, filled this in, and then you were [194] going to have those people sign that statement, is that it?

A. After they read it. I put that statement in

(Testimony of Bernard George Aguer.)

after they read the original statement of the boys.

Q. It is your testimony, then, that both John Martin Souza read this statement and Mrs. Josephine Souza read this statement before you ever wrote in this paragraph that I just read to you?

A. Not the last one, no. I wrote the statement out the boy gave me and then I put down in conclusion, "Have you read and do you understand," for the boy to sign, and that is when the mother objected. And, of course, the mother had read the statement also. So then I put in for Mrs. Souza, there, and then, of course, she wouldn't sign either.

The Court: Q. She didn't say "I witnessed"? You asked her a question and she answered it, and then you put that down in your own words?

A. That is right, that is right.

Q. In other words, when you refer to putting down the statement as nearly as possible, you refer to the main statement about the accident, not that. That is so obviously in terminology she is not likely to use.

A. That is right.

Q. (By Mr. Myers): Isn't it a fact that this entire statement was written by you, Mr. Aguer, after you had left the home of Mrs. Souza on whatever day it was that you were out there?

A. That statement was written in the home of the Souzas in [195] the presence of Mrs. Souza and her son.

Q. It is your testimony that they saw you——

The Court: He has answered that. You have asked him that two or three times.

(Testimony of Bernard George Aguer.)

Q. (By Mr. Myers): —saw you write this statement, is that it? A. Absolutely.

Q. When you went to the home of Mrs. Souza, did you go there for the purpose of obtaining a statement? A. Yes, sir.

Q. When you got to her home did you tell Mrs. Souza that you came there to get a statement from her son, John Martin Souza? A. Yes, sir.

Q. Did you also tell them that there was no obligation on their part to give you a statement?

A. No, sir, I don't believe I did.

Q. Did you hold out any promises to them, at all, to get them to give you a statement?

A. No, no promises. I made no promises.

Q. Of their own free will and accord, then, John Martin Souza, it is your testimony, related all this to you? A. Absolutely, yes, sir.

Q. And then after you had gone to the trouble of writing it all down, then these people refused to sign it, is that your testimony? [196]

A. Mrs. Souza did, yes.

Q. How about John? Did he refuse to sign?

A. Well, he acquiesced to his mother's wishes. In other words, after his mother said she didn't want to sign it, he simply wouldn't sign, and she wouldn't sign, either.

Q. What did you tell them when you left their home that day? That you would be back?

A. I don't believe I told them that, no.

Q. Didn't you tell them that you would be back in about a week or two when they were feeling better?

(Testimony of Bernard George Aguer.)

A. No, I don't recall telling them that, at all. There would be no need for me to.

Q. What is your memory? After you had finished writing up this statement, according to your testimony, then, after you had finished writing up the statement what did you tell them when they refused to sign it?

A. I don't recall telling them anything. It was their privilege. I mean to say if they didn't want to sign it I couldn't force them to sign it, and so I just paid my respects and left, as I recall.

Q. And you did not say anything about being back again?

A. No, I don't recall saying that, because there would be no need for me to come back.

Q. You didn't say you would come back later with a statement for them to sign? [197]

A. No, I didn't. I didn't.

Q. Are you sure you didn't tell them that?

A. I don't recall telling them that.

Mr. Myers: That is all.

Mr. Dunne: That is all.

The Court: Have you another witness?

Mr. Dunne: He may be fairly long, your Honor.

The Court: Who is he?

Mr. Dunne: He is the other man who was in the cab of the locomotive.

The Court: We will make up for it if necessary tomorrow at the noon hour, but we had better not start a long witness at this time. You will remember you asked for the privilege of passing those

photographs. If you want to do that for the next minute or so, you may pass those photographs.

Mr. Myers: Just the one.

The Court: Pass the photographs to the jury.

Mr. Myers: May I pass this exhibit to the jury, your Honor?

The Court: Yes; go ahead.

Mr. Dunne: If your Honor please, at the same time I put in some photographs that——

The Court: That's all right. We will take a little time and have the jurors examine the photographs.

Mr. Dunne: They might as well look at all of them at one time.

The Court: I will tell you what to do. Start the group in the back and let them meet backwards, you see; start that way and start one in the back. Now, just swear the witness and then I can tell him to come back in the morning, to come right in the courtroom in the morning.

(Witness Brown for the defense was then sworn by the clerk.)

The Court: Have you any other witnesses who will testify to the incident of the accident or is he the only one?

Mr. Dunne: No, we have some others, your Honor.

The Court: Well, after he has testified I will relax that rule, because after there has been a conflict established before the jury and the jury have heard the two stories, there is no reason for maintaining the rule and we can speed up examination of witnesses. You don't want this man now?

Mr. Dunne: Well, this is Mr. Brown. He will also be a witness. [199]

The Court: He is not the first witness?

Mr. Dunne: No, he is not the first witness.

The Court: You go back. We will swear the other man so he can come right in in the morning.

FRANK MELLOLO,
called as a witness on behalf of the defendant; sworn

The Clerk: Will you state your name?

A. Frank Mellolo.

The Court: I just wanted to swear you in tonight but you won't be examined tonight. You come back tomorrow morning and come right into the courtroom and you will be the first witness to be examined in the morning. You may be excused until tomorrow morning.

Mr. Dunne: At ten o'clock.

The Court: Come directly in here without waiting to be called.

The Witness: Ten o'clock; all right.

(The jurors then viewed the photographic exhibits.)

The Court: The jurors have examined the exhibits and they will be returned to the clerk.

Ladies and gentlemen, we are about to take an adjournment until tomorrow morning at ten o'clock. The court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial of this cause, or form [200] or

express an opinion thereon until the cause is finally submitted to you.

You have seen today the problem which will confront you. You have had testimony as to incidents which one witness says took place and another witness says did not take place. You will have to resolve the conflict. To do that and to decide all of the matters you will need the instructions of the court as a guide in determining the credibility, so I give you again the injunction, keep your minds open until all the evidence is in and the case submitted to you after the arguments of counsel and the instructions on the law by this court.

(The trial was then adjourned until tomorrow, Thursday, July 22, 1948, at 10:00 o'clock a. m.) [201]

Thursday Morning Session, July 22, 1948,
10:00 o'clock

The Clerk: Case of John Martin Souza against the Southern Pacific Company; on trial.

The Court: Proceed. Let the record show the jury is in the box.

FRANK MELLOLO

called by the defendant, previously sworn.

The Clerk: Will you state your name?

A. Frank Mellolo.

Direct Examination

Q. (By Mr. Dunne): Mr. Mellolo, will you please state your name again?

A. Frank Mellolo.

Q. What is your business?

(Testimony of Frank Mellolo.)

A. Railroad trainman and conductor; brakeman and conductor.

Q. You are a promoted man? A. Yes.

Q. Working for what railroad?

A. Southern Pacific.

Q. How long have you worked for the Southern Pacific? A. Twelve years.

Q. How long as a brakeman?

A. Four years. [202]

Q. Then you were promoted?

A. Two years as brakeman, two years as conductor.

Q. That takes up four years. What was the other of the twelve years? A. Yardman.

Q. That is the same general character of work except confined to the yard? A. Yes.

Q. Were you working for the Southern Pacific Company in October, 1945? A. Yes.

Q. On what division were you working?

A. Western Division, Stockton District.

Q. Tell us where the Stockton District of the Western Division is.

A. It runs from Tracy to Roseville and Roseville to Fresno and Fresno to Tracy.

Q. In October of 1945, where was your home; where were you living?

A. Stockton, California.

Q. In October 1945, the date is the 11th of October, were you on a locomotive that was involved in a crossing accident and an automobile a short distance railroad west of Modesto at a crossing

(Testimony of Frank Mellolo.)

known as Beckwith Road? A. Yes. [203]

Q. Do you recall the name of the engineer on that locomotive? A. Mr. Glanville.

Q. Did you know him before this time?

A. Yes.

Q. Do you recall who the fireman on that locomotive was? A. No.

Q. Can you tell us about the number or the type of the locomotive?

A. It was a 2400; 2487.

Q. Where had you come from on that morning?

A. From Fresno.

Q. At the time of the accident was that locomotive drawing any cars or was it operating light?

A. Light engine displaying markers.

Q. So the record will be clear, you and I understand what that means—what does it mean?

A. Light engine displaying markers is a train.

Q. Does it have cars? A. No cars.

Q. But it is known on the railroad as a train?

A. Yes.

Q. Will you please tell the ladies and gentlemen how you happened to be riding a light engine?

A. I was ordered that morning to deadhead to my home terminal the most convenient way I could get there and as I left the [204] crew dispatcher's office, I met Mr. Glanville who was going to Sacramento and he said it would be all right to ride with him as far as Manteca and I could get a bus from Manteca to my home terminal which is Tracy, which I did.

(Testimony of Frank Mellolo.)

Q. Explain that so the jury will understand. Going from Modesto northward to Tracy, is there a line of railroad that goes into Tracy?

A. Is there a line?

Q. Yes. A. Yes, there is.

Q. Going northward from Modesto, or railroad west from Modesto, is there a line of railroad that goes into Sacramento without going through Tracy?

A. Yes.

Q. Where does that turn off? A. Lathrop.

Q. Where is Manteca with respect to Lathrop?

A. Well, it is about four miles, three or four miles from Manteca.

Q. What, Lathrop? A. Yes.

Q. Which direction from Lathrop is Manteca?

A. Lathrop is west of Manteca.

Q. So that Manteca then is on the line of railroad between Modesto and Lathrop? [205]

A. Yes.

The Court: A different county. Manteca is in San Joaquin County.

Mr. Dunne: That's right. I was speaking of the town of Modesto.

Q. Was that trip a revenue trip? A. Yes.

Q. Were you paid for it?

A. Yes, I was paid for it.

Q. Can you tell us about what time the locomotive left Fresno?

A. It was in the early morning; I don't know the exact time.

Q. On that trip where did you ride in the locomotive?

(Testimony of Frank Mellolo.)

A. I rode in the gangway of the engine.

Q. On which side, Mr. Mellolo?

A. On the right side.

Q. Is that the engineer's side or the fireman's side?
A. That is the engineer's side.

Q. I want to show you Defendant's Exhibit R here, this is a photograph taken of the side of 2487 and somewhat from the front and ask you if you recognize that as a photograph of the locomotive.

A. Yes.

Q. I think if you would hold it that way so the jurors can see it. I will ask you to point out to them where the gangway is.

A. The gangway is the ladder that you step down from the [206] engineer's platform to the ground; there is a platform from the watertank, that divides the water tank and the boiler. The boiler is the big part of the engine, the front part, and there are two grabirons that are in between this platform and I was standing right at the gangway here facing the cab.

Q. Where was the engineer?

A. He was sitting on the seat box.

Q. Where would that be in relation to where you were standing?

A. He would be in front of me. I was standing behind him.

Q. There is a window that shows there on the side of the cab and out of it there is a little tiny object. Do you know what that is?

A. That is a steel—that is his armrest.

Q. Is that where he was, at the window?

(Testimony of Frank Mellolo.)

A. Yes.

Q. Behind the engineer, was there anything between you and him? A. Yes.

Q. What? A. Steel plate.

Q. How wide is that plate?

A. Approximately about, I would say about half inch.

Q. I mean this way (indicating).

A. Oh, it is about three feet, approximately three feet.

Q. Do you recall whether or not from Fresno up to the point of the accident the locomotive made any stops? [207]

A. Yes. It made, I believe, two stops.

Q. On those stops did you perform any function in connection with the operation of the locomotive?

A. I lined the switches into the siding and out of the siding and behind the engineer entering and leaving the siding.

Q. On that particular piece of track, Mr. Mellolo, between Fresno and Manteca, have you worked over that? A. Yes.

Q. For how many years have you worked over that? A. Four year.

Q. Do you know where Modesto is located?

A. Yes.

Q. After you went to Fresno and went to Modesto and then you were on the locomotive at the time of the accident, were you? A. Yes.

Q. Then you continued on the locomotive for how far? A. To Manteca.

(Testimony of Frank Mellolo.)

Q. Did you get off at Manteca?

A. Yes, sir.

Q. Where in Manteca did you get off?

A. Near the SP depot.

Q. Is Manteca just a siding, a name, or is there a town there?

A. There is a town there.

Q. I want to call your attention and get some information from you with respect to what happened after you left Modesto and I [208] wish you would tell the jury particularly now from Modesto up to the point of the accident where you were riding in the locomotive.

A. I was sitting in the gangway of the locomotive facing the highway. The gangway was on the right side of the engine, the engineer's side, watching the automobiles go by on the highway.

Q. Were you doing anything else?

A. No.

Q. Were you talking to the engineer?

A. No; I could not.

Q. Did you talk to the fireman at any time from the time you left Modesto up to the time of the accident?

A. Only when we picked up train orders, to read the train orders.

Q. That was the only conversation you had?

A. That was the only conversation.

Q. Is that for the whole trip?

A. The whole trip.

Q. I wish you would tell the jury your recollection of the operation of the locomotive from Mo-

(Testimony of Frank Mellolo.)

desto up to the point of the accident with respect to its speed, whether its speed was the same, whether it varied, how it varied and what it did. I want you to give the information to the jury, as exact information as you can as to the speed and operation of the locomotive from Modesto to the point of the accident. [209]

A. Well, he was traveling approximately 40 miles an hour.

Q. At what time? A. At what time?

Q. Yes. Was he going 40—did he go through Modesto at 40?

A. No. He reduced speed for Modesto.

Q. Where in Modesto did he reduce speed?

A. When he hit, just approaching the Tidewater Southern Railway crossing.

Q. Is that a railroad crossing there?

A. It is; east of Modesto.

Q. That is the crossing of another railroad?

A. Yes.

Q. What is your best estimate as to the speed to which he reduced? A. 25 miles an hour.

The Court: That is not a steam railroad. That is an interurban, Tidewater Southern. That is an interurban or electric railroad, isn't it?

A. That is a steam.

The Court: A steam railroad. A. Yes.

Q. (By Mr. Dunne): Where in Modesto is that crossing, is it railroad east end of Modesto or railroad west end, or is in the center of town?

A. It is the east end of Modesto, just entering Modesto yard. [210]

(Testimony of Frank Mellolo.)

Q. After you crossed the Tidewater Southern, what was the operation of the locomotive as to speed?

A. He reduced speed to 20 miles per hour through Modesto.

Q. Then what happened?

A. Then when he was out of the yard at Modesto, which is approximately a mile, a mile and a half from the Modesto depot, he then increased to 40 miles an hour.

Q. Just immediately before the accident, what was the speed of the locomotive?

A. Just before the accident?

Q. Yes.

A. Well, it was in an emergency just before the accident and I don't know what the exact speed was when we hit the automobile.

Q. What was its speed when it went into emergency? A. 40 miles an hour.

Q. Did you at any time see the automobile which was involved in the accident before it was struck by the locomotive? A. No.

Q. When did you first see it?

A. As it went by the right side of the engine, it was in motion, a spinning motion.

Q. As you were running along there, what was the first thing that attracted your attention? You said that the locomotive went into emergency. Was there anything specially that attracted [211] your attention before then?

A. Yes. I noticed the way he was blowing his

(Testimony of Frank Mellolo.)

whistle; it was sudden and some different than a regular crossing whistle. Regular crossing whistle he just has two longs, short and long. Well, this one—to one who work on railroads, it was known to railroad men and engineers as disaster. You could tell by the way he is blowing his whistle.

Q. Before that had he blown a crossing whistle for this crossing, before the accident happened?

A. Had he blown it before?

Q. Yes. A. Yes.

Q. Then after that was this unusual whistling?

A. Yes.

Q. Then what happened?

A. Well, I sensed something was wrong and the automobile was in a spin and I could see the damaged automobile.

Q. You said the locomotive went into emergency? A. Yes.

Q. Will you tell the jury what that is?

A. Well, they have an emergency brake and it sets the brakes up immediately and when he puts it into emergency you can hear the air escaping, which escapes very suddenly.

Q. Who operates that? A. The engineer.

Q. What does he operate to put in into emergency? A. A lever.

Q. Where is that located in the cab?

A. It is right in front of him.

Q. You say the locomotive went into emergency. I would like you to tell the jury what attracted your attention, was it the brakes taking hold or was it the blowing of the air?

(Testimony of Frank Mellolo.)

A. It was both, the blowing air and the brakes taking hold.

Q. Up to that time had you heard the engineer say anything? A. No.

Q. Had you heard the fireman say anything?

A. No.

Q. Tell me, Mr. Mellolo, as you left Modesto and went up to the point of this accident, I would like you to tell the jury what the character of the weather was. A. It was clear, daylight.

Q. Do you remember about what time it was?

A. Not the exact time but it was in the morning.

Q. Was there any fog? A. No.

Q. Any rain? A. No.

Q. Any haze? A. No, sir.

Q. Can you tell us whether or not as the locomotive approached [213] this crossing where the accident happened, whether the engine bell was ringing?

A. No, I can't state because there are times you can hear the bell ringing and there are times you can't hear it ringing on an engine. When you go by buildings and signboards you can hear it ring; the echo, I believe. There are times you can't hear the bell ringing in the cab of the engine traveling at that speed.

Q. With the locomotive traveling light that way, is the locomotive itself, aside from any bell or whistle, making any noise? A. Yes.

Q. You have been in a cab and all this is clear to you, but I wish you would tell the ladies and

(Testimony of Frank Mellolo.)

gentlemen who probably have not been in a cab what the noise in the cab is.

A. Well, it is a pounding noise, a rattling noise. It is almost impossible to talk in the cab of an engine traveling 35 to 40 miles an hour from the rattling and pounding of the engine. You have to scream in order to talk.

Q. You have told us you saw this car spinning. Which side of the engine was that one; was that on the fireman's side or the engineer's side?

A. The engineer's side.

Q. Was that the side where you have been standing? A. Yes. [214]

Q. Can you give us any idea after the car was spinning and after the emergency brakes were set how far that locomotive ran beyond the crossing before it stopped?

A. That I don't remember. It happened so long ago. Really, I don't remember the exact distance that it was.

Q. Did the locomotive come to a stop?

A. Yes.

Q. After the locomotive came to a stop what then was done?

A. We backed up to the scene of the accident.

Q. And was assistance given to those that had been injured? A. Yes.

Q. About how long was the locomotive there at the scene of the accident?

A. Well, it was there until the ambulance arrived and the Highway Patrol arrived and the

(Testimony of Frank Mellolo.)

Highway Patrolman said that he would take charge and I don't know the exact time that we stood there but he had everything in control. He said he would take care of everything and we left for our destination.

Q. All right. After you left was there any other stop made by the locomotive between the scene of the accident and Manteca?

A. Yes sir; there was one stop made.

Q. Will you please tell the jury about that stop?

A. The engineer started—he left the scene of the accident and the locomotive was traveling at about 40 miles per hour and he [215] put it into emergency to see what distance that it would take to stop the engine traveling at 40 miles per hour.

Q. How did that distance compare with the stop at the scene of the accident.

Mr. Myers: Just a minute. I object to that as incompetent, irrelevant and immaterial. The witness stated he does not know how far the engine traveled after the accident.

Mr. Dunne: He may not know in feet, but he can certainly have made both——

The Court: Unless it is expressed in true distance, I mean comparative speed—I will sustain the objection.

Mr. Dunne:—I have no further questions. [216]

Cross-Examination

Q. (By Mr. Myers): Mr. Mellolo, do you still live in Tracy? A. Yes, sir.

Q. Have you lived there ever since this accident happened? A. Yes, sir.

(Testimony of Frank Mellolo.)

Q. Do you still work on the same division?

A. Yes, sir.

Q. After this accident happened did you discuss the case with anyone? A. Yes, sir.

Q. With whom did you discuss it?

A. The first time was at Roseville. A man came up to get a written statement of the accident.

Q. At Roseville? A. At Roseville.

Q. When was that?

A. It was sometime in May, I believe.

Q. Of what year? A. Of this year.

Q. May of this year, so that this accident happened October 11, 1945, and the entire period from the time of the happening of the accident until May of this year went by without you discussing the case with anyone, until this man came to get the statement, is that correct? A. Yes, sir.

Q. Are you familiar with the rule of the company that requires employees to file reports immediately after the happening of an accident?

A. I was merely deadheading.

Q. Pardon me, sir? Are you familiar with that rule? A. Yes, sir.

Q. And you did not file a report then?

A. No, sir.

The Court: You started to give your reason when counsel interrupted.

Q. Why didn't you file it?

A. I was merely deadheading and I was not responsible for the locomotive.

Q. Go ahead and finish.

(Testimony of Frank Mellolo.)

A. I was not responsible for any part of that locomotive, and so I didn't have to make out a statement.

The Court: All right.

Q. (By Mr. Myers): So long as you felt that you did not have to make——

The Court: He didn't say he felt; he is stating a fact. Please do not add words to his answer.

Mr. Myers: I am sorry, your Honor.

The Court: He did not say he felt; he said he wasn't responsible for it.

Q. (By Mr. Myers): Is it your testimony that you were not [218] required to make out a report?

A. That is the way I see it. I didn't have to make out an accident report.

Q. That is a company rule, that you do not have to make out a report unless you are in charge of equipment, is that right?

A. Well, the way I interpret the rule——

Q. Pardon me, sir.

The Court: He doesn't have to answer "Yes" or "No." You know that.

Mr. Myers: I thought maybe——

The Court: No, he is not required. You are cross-examining him. He is not required to answer "Yes" or "No." Complete your answer, please.

The Witness: Deadheading you are not on duty. If you are on duty deadheading it interferes with your Hours of Service Act, and if I was to make a report I would have to show time, and that would come on my Hours of Service Act, and I would be violating the State law.

(Testimony of Frank Mellolo.)

The Court: Q. In other words, as you understood your position, you were not taking any active part in any operation; you were just getting a ride, isn't that true? A. Yes, sir.

Q. To your next station, and for that reason you did not make any report?

A. That is right. [219]

Q. (By Mr. Myers): Is it your testimony that this was not a paid trip?

A. We get paid for deadheading.

Q. You get paid for deadheading, so that in getting paid for deadheading, then under the company rules you were required to make a report, were you not?

Mr. Dunne: That is objected to.

The Court: I will sustain the objection. It is not material whether he made a report, or not. The only object of the inquiry is to show whether he remembered. He has already given his reason why. He is not charged with any dereliction of duty in failing to make a report. He has merely explained why he was not approached and did not make a report. He has given an answer, and you stop right there; otherwise I am going to instruct the jury that all this inquiry does not reflect upon the credibility of his testimony.

Mr. Myers: Very well, your Honor.

The Court: All right.

Q. (By Mr. Myers): Was it after May 21, 1948 that you made this report to the company?

A. I don't remember the exact date.

(Testimony of Frank Mellolo.)

Mr. Myers: May I ask counsel if he has that report?

Mr. Dunne: It is not a report. It was a statement. It is not a 2611. I am handing the original of the statement to [220] counsel.

Mr. Myers: I merely wanted to get the date, your Honor, off the statement.

The Court: All right.

Mr. Myers: With your Honor's permission I should like to ask one more question on the matter of making a report, and I hope I am in order.

The Court: Ask the question and I will tell you.

Q. (By Mr. Myers): Mr. Mellolo, isn't the fact that the reason you filed no report as to the happening of this accident was that you, yourself, were violating the rule of the company in riding in the cab of the engine and therefore did not file a report as to the happening of the accident?

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial.

The Court: I am going to allow him to answer, but I will instruct the jury in advance that whatever the answer is, the fact that he may be violating a rule of the company in traveling along does not affect his credibility. That is not the way to impeach a witness, you see. I am allowing the question because it is merely an explanation as to why he did not file a report and was not asked before this date to give a report. You may answer the question.

A. No, sir, I was not.

Q. (By Mr. Myers): It is your testimony that

(Testimony of Frank Mellolo.)

you were riding [221] in the gangway of this locomotive, on the engineer's side, which would be the Highway 99 side of the engine, is that correct?

A. Yes, sir.

Q. How far had you ridden in the gangway of the engine? A. From Fresno.

Q. You had stayed in that particular place all the way from Fresno up to the time the accident happened? A. In the gangway.

Q. I believe you stated on direct examination that you may have had to align some switches at one time or another. A. Yes, sir.

Q. With the exception of that you stayed in the gangway of the engine all the time?

A. No, sir, I read train orders, picked up train orders and handed them from one employee to the other.

Q. In any event, in the gangway of the engine as you rode along there, you heard the engine from time to time whistle for railroad crossings, did you?

A. Yes, sir.

Q. Having in mind that this accident happened in October of 1945, can you state definitely that when you gave this statement to the claims man in Roseville this year that you have a distinct recollection that a whistle was sounded at this one particular crossing? [222]

A. Will you repeat that?

Mr. Myers: May the question be read?

The Court: Read the question, Mr. Sweeney.

A. Yes, I can state that.

(Testimony of Frank Mellolo.)

Q. (By Mr. Myers): You are sure that you remember a whistle being sounded, is that right?

A. Yes, sir.

Q. Was there a whistle sounded at North Road, which was approximately 3600 feet railroad east, or, from the standpoint of our directions, south of this particular crossing where the accident happened?

A. Yes, whistles were blown at all railroad crossings.

Q. Pardon me. Was a whistle sounded at that crossing?

A. Yes, sir.

Q. You distinctly remember that?

A. It was at all railroad crossings.

Q. You distinctly remember a whistle being sounded at North Avenue, do you?

A. Yes, sir.

Q. Was that the usual whistle, or was that a series of short blasts?

A. That was the usual whistle.

Q. The usual whistle?

A. Yes, sir.

Q. Where was it sounded with reference to that crossing? [223]

A. At the crossing whistle post, from the crossing whistle post to the crossing.

Q. How far south of that crossing or railroad east?

A. East?

Q. Of the crossing, yes.

A. Well, it is between the crossing whistle post and the crossing. I don't know the exact footage on the distance.

Q. You do not recall how far it was from that

(Testimony of Frank Mellolo.)

crossing the whistle was sounded, is that right?

A. No, sir.

Q. How far railroad east of that crossing was the whistle last sounded?

A. What crossing are you speaking of now?

Q. I am speaking of the next crossing south of that.

A. Between the crossing post and the crossing.

Q. How far was that crossing south of North Avenue?

A. How far is the crossing?

Q. Yes.

A. I don't know the distance of them crossings.

Q. How many whistles were sounded? How many crossings were whistled for after your engine left Modesto until this accident happened?

A. How many?

Q. Yes.

A. I don't count the crossings as I travel from station to station. [225]

Q. Was a whistle sounded more than twice after you left Modesto on this particular day?

A. What point of Modesto?

Q. The town of Modesto.

A. Yes, whistled twice.

Q. What is that? A. Yes, sir.

Q. How many times was it sounded?

A. I don't count them. I don't know.

Q. The fact of the matter is you have no memory of that, is that right?

A. I don't count crossings from town to town.

(Testimony of Frank Mellolo.)

Q. As a matter of fact, Mr. Mellolo, you do not have any independent memory of a whistle being sounded at Beckwith Road, do you?

A. I do, sir.

Q. Then your memory in that regard immediately at the time the engine went into emergency and you saw particles of the automobile flying, there was a series of short blasts, isn't that true?

A. The whistle was blowing, and if you ever ride an engine and it is your first time that you have ever seen anybody hit by a locomotive, you will never forget seeing it, and you will never forget that whistle. That was my first experience on a locomotive hitting an automobile. [225]

Q. Just come back to my question. The whistle that you are talking about, however, was a series of short blasts that took place immediately at the time this car was struck, isn't that true?

A. He blew the crossing whistle between the crossing sign post and the crossing, and then after that there was a consecutive short blast.

Q. How far from the crossing did he blow the whistle, from Beckwith Road?

A. I don't know the distance between the crossing post and the crossing.

Q. Haven't you any idea how long it was before reaching Beckwith Road the whistle was sounded, if it was sounded?

A. Before reaching the crossing?

Q. That is right.

A. I don't know the exact footage on that.

Q. Put it this way: How much time elapsed

(Testimony of Frank Mellolo.)

from the time that whistle was blown until you saw the particles of the automobile fly and felt the engine go into emergency? From the standpoint of your time, how much time elapsed?

A. I don't know the exact time.

Q. What is your best estimate?

A. Well, he blew two long, a short, and a long, and after that there were several shorts, and he was still blowing—after the accident happened it was still blowing, the engine. I [226] guess he was excited and nervous, and so I don't know the time between the whistles.

Q. You have no idea, then, in the lapse of time, how much time elapsed from the time he first sounded that whistle until the accident happened?

A. That is right.

Q. You travel on time, do you not?

A. Yes, we travel on time.

Q. What is that? A. Yes, sir.

Q. A railroad man's watch is the most important part of his equipment, isn't it? A. Yes, sir.

Q. Is it your testimony that you do not have any idea at all the time that elapsed between the time of the sound of the whistle and the time the accident happened?

A. On railroad time we do not guess at time. We have to use accurate time.

Q. All right. Do you have any estimate on it?

A. No, I do not.

Q. Might it have been a minute?

A. I wouldn't make no statement.

(Testimony of Frank Mellolo.)

Q. What is that?

A. I wouldn't state no time on it.

Q. Could it have been thirty seconds? [227]

A. It possibly could.

Q. Do you think that 30 seconds would be a fair estimate of the time?

A. Well, I believe that 30 seconds would be a little long.

Q. Would you say 20 seconds?

A. About that.

Q. 20 seconds would be your best judgment?

A. It would be.

Q. Did you get out of the engine after the accident happened?

A. Yes, sir.

Q. What did you do?

A. I just watched what went on.

Q. When the engine moved out again were you let out somewhere?

A. Was I let out?

Q. Let out of the engine.

A. Yes, at Manteca.

Q. At some crossroad?

A. At the depot at Manteca.

Q. The engine slowed down and you stepped off?

A. It stopped.

Q. What is that?

A. It came to nearly a stop. It didn't have to come to a dead stop.

Q. It slowed up slow enough for you to get off and then it went on its way, is that right? [228]

A. That is right.

Q. You think that it was between the point of where this accident happened and the point where

(Testimony of Frank Mellolo.)

you got off that the engineer made another emergency stop? Do you remember that, do you?

A. From the point of the accident to where?

Q. To where you got off.

A. Did he make an emergency stop?

Q. Yes. A. Yes, he did.

Q. Whereabouts was that?

A. It was leaving Modesto, the scene of the accident, that crossing where the accident happened, leaving there, between there and Manteca.

Q. After you talked to this claims man who took the statement from you in Roseville, this year, whom else did you talk to after that time, if anyone? A. Mr. Dunne, the attorney.

Q. Did you talk to anyone else?

A. No, sir.

Q. Did you discuss the facts of the case with both of those gentlemen?

A. I gave them a statement on what I knew of it.

Q. I noticed on direct examination, in answer to Mr. Dunne's questions, Mr. Mellelo, you stated that it was a clear day, it was not raining and there was no fog, is that right? [229]

A. Yes, sir.

Q. And I thought that you hesitated a bit on the haze. Now, what is your memory about the haze on this particular morning?

A. It wasn't hazy. I stated it was clear.

Q. Was there any low-lying ground haze?

A. No, sir.

Q. You are familiar with this particular re-

(Testimony of Frank Mellolo.)

gion, are you not? A. Am I? Yes, sir.

Q. Do you oft times in October encounter a low-hanging ground haze?

A. Yes, we have clear days, too, in the fall.

Mr. Myers: I think that is all.

Mr. Dunne: That is all, Mr. Mellelo. Call Mr. Talt.

The Court: I think, gentlemen, from now on I am going to lift the rule and you may bring all the witnesses in at the present time.

Mr. Myers: Well, your Honor, I do not want to be in the position of arguing about something all the time, but the way I feel about it is this: I asked for the rule and kept my own witnesses out so they could not hear one another's testimony, and I do not feel it is fair to the plaintiff to have the rest of these witnesses in so they can hear one another testify.

The Court: Is there any other witness to the accident?

Mr. Dunne: Oh, yes, there are other witnesses to the accident, your Honor. [230]

The Court: I thought there were no other witnesses.

Mr. Dunne: Oh, no, we shall have some other witnesses.

The Court: I will let the rule stand, but I will tell you this is the last time I will allow it in any case I try here. I do not allow it in Los Angeles, at all. I do not believe in the rule. However, since I granted it I will let it go.

D. H. TALT,

called as a witness on behalf of the defendant;
sworn

Q. (By the Clerk): Will you state your name to the jury?

A. My name is D. H. Talt.

Direct Examination

Q. (By Mr. Dunne): Mr. Talt, what is your business? A. I am a civil engineer.

Q. For whom do you work?

A. Southern Pacific Company.

Q. In what capacity?

A. I am in charge of the surveying and mapping on the Stockton District, which extends down the west side and east side from Lathrop to Fresno.

Q. And do you have a title with the Southern Pacific Company?

A. My title is assistant engineer.

Q. How long have you been assistant engineer doing that particular work on that part of the Stockton Division?

A. On that part of the division 5 years. [231]

Q. On what part of the division is the part of the track, the main track between Modesto and Manteca? A. On what part of it?

Q. Yes. A. It is on the east side.

Q. Is that within this Stockton Division which you have described? A. Yes, sir.

Q. Have you for a period of five years, yourself, been familiar with that particular stretch of track?

(Testimony of D. H. Talt.)

A. Yes, sir, I have gone over it a good many times in the course of my work.

Q. I call your attention particularly to the piece of track between Modesto and Salida. Have you been familiar with that particular piece of track?

A. Yes, sir.

Q. Mr. Talt, did you draw the two diagrams which are here on the blackboard?

A. These diagrams were drawn by one of my draftsmen under my supervision, and I personally took them into the field afterwards and verified them on the ground by measuring distances, and checking against the actual topography on the ground.

Q. So that they have been checked against actual field notes? A. Yes, sir.

Q. On the upper one, which I think is still marked Court's [232] Exhibit 1, I want to call your attention to a series of devices between what has been identified as the track and the southward lanes of Highway 99, and ask you what that series of devices is intended to represent.

A. Those devices represent trees and bushes.

Q. I call your attention to the fact that there is apparently an island dividing the southward lanes of Highway 99 and the northward lanes of 99, and in that dividing island or strip there are also some devices. What are those intended to represent?

A. Those are trees and some bushes.

Q. In the lower of the two diagrams, Plaintiff's Exhibit 2, there are also similar devices between

(Testimony of D. H. Talt.)

the track and Highway 99, and then in the division strip or island in the highway: What do those represent? A. Those represent trees and bushes.

Q. Who put those in there on those two diagrams?

A. They were put in under my direction from measured notes.

Q. Is the location of those trees and bushes guessed at or are they actually located?

A. No, sir, they were actually measured with a steel engineer's tape, graduated in feet, tenths and hundredths of a foot.

Q. Mr. Talt, I wish you would give me some measurements so that the jury may have them. I want to know the distance between Beckwith Road and North Road. [233]

A. Beckwith Road and North Road is 3989 feet, I believe. I think I have it here in my notes. 3579.6 feet.

Q. Now, measured along what line?

A. That is measured along the center line of the railroad track, and it is from the center line of Beckwith Road to the center line of North Road.

Q. May we have that again?

A. The distance is 3579.6 feet.

Q. If I may mark that on here. Can you give me the distance from some point with reference to Beckwith Road down to the turn-off for Dale Road, where it turns off Highway 99?

A. Yes, the distance from the center—

Q. No, no, from Beckwith Road, first.

A. From Beckwith Road?

(Testimony of D. H. Talt.)

Q. Yes.

A. To the center line, that is, this center line produced out here, it is 1162 feet.

Q. Produced out to what point on Highway 99?

A. Produced out to the center line of the highway.

Q. I will mark that, if I may, and from what point did you take from Beckwith Road?

A. The center line—opposite the center line of the crossing.

Q. Opposite the center line of the railroad crossing?

A. Yes.

Q. That is 1100—

A. And 62 feet. [234]

Q. Now, so that we may have it clear, Mr. Talt, will you give me from this same point in the intersection of Dale Road and Highway 99 to some point up there by Walnut Avenue the distance, so that we may have those distances?

A. Well, the distance to this fence here is 912 feet.

Q. Let me mark that, and either scaling it off the map or otherwise, can you give me the distance from the point of that fence to the center line of Walnut Avenue, so that we will know that?

A. Yes, I have that here. That is about 115 feet.

Q. I will mark that, if I may. Now, so that we may get it, Mr. Talt, I want you to take the center line of Beckwith Road and project it. Incidentally, are you familiar with the Government Survey of that country in there, the townships and sections?

A. Yes, sir, I have checked the section lines in

(Testimony of D. H. Talt.)

there against the county records at Modesto and also against our records, from our right-of-way maps.

Q. Is Beckwith Road located with respect to any section line?

A. It is along a section line, yes, sir.

Q. What about Walnut Avenue? How is that located?

A. Walnut Avenue is right in this side of the section line. It is 40 feet from the section line projected across here. It is 40 feet over to this side of Walnut Avenue.

Q. If the center line of Beckwith Road were projected across that field toward Dale Avenue now, where would it intersect [235] Dale Avenue?

A. They are both practically on the same line. The section lines go along here, this edge of the road, 40 feet over.

Q. What I would like to know, Mr. Talt, is what is the distance from the intersection of the center line of Beckwith Road and the railroad track over to the point where the projection of the center line of Beckwith Road intersects Dale Avenue, or Dale Road?

A. Well, it is practically 900 feet, lacking about 5 feet. I would say 895 feet.

Q. I will mark that, if I may. Take that to the center of Dale Road. A. Yes.

Q. 895 feet. A. 895.

Q. So that we may have it, from this same point at the intersection of Beckwith Road and the railroad track, the distance from there over to the gas

(Testimony of D. H. Talt.)

station—I think first we had better locate it. Which one of those buildings is the gas station?

A. The one this way (indicating). This is the gas station, in here, the Texaco Station.

Q. I will mark that, if I may. Now, if you will give us this distance I am going to mark here.

A. That is about 230 feet. [236]

Q. Will you please keep your voice up so everybody can hear?

A. It is about 230 feet.

Q. Now, so the jury can orient themselves, what are the outside measurements of Highway 99, from the outside of the northbound lane to the outside of the southbound lane, so that it includes the full width of the four lanes and the island in the center?

A. About 75 feet from outside to outside of the two lanes.

Q. I am sorry, I didn't hear you.

A. About 75 feet from outside to outside of the two lanes.

Q. I will mark that. And from the center line of the railroad track to the nearest edge of Highway 99, what is that distance?

A. About 65 feet.

Q. I will mark that, if I may. Mr. Talt, you have on both of those diagrams lines, various lines, and then at various places on those lines are little crosses. What are those intended to represent?

A. These along here?

Q. Yes. A. Those are fence lines.

Q. In the lower of the two diagrams, No. 2, there is a fence line which would be geographically to the south of Beckwith Road. I want you to give me—was that map accurately located?

A. Yes, sir, that was accurately measured.

(Testimony of D. H. Talt.)

Q. At its end which is nearest to the railroad line I want you [237] to give me two measurements, one from the center line of the track at right angles to the track, to the end of the fence—no, to the end of the fence that runs along Beckwith.

A. Oh, the end of the fence here?

Q. That is correct.

A. From the center line of the track at right angles. [237-a]

A. That is 325 feet—no, no. Wait. The scale is different here. This is 20 foot to the inch. It is 65 feet.

Mr. Dunne: I will mark that, if I may.

Q. Now, I want you to give me the distance from the projection of those fence lines from this end out to the center of the track, that distance.

A. 90 feet.

Mr. Dunne: I will mark that, if I may.

Q. So we will relate it, from that same point measured parallel to the center line of the track, what is the distance to the end of the fence down to where such a line would intersect the Valley Brew sign?

A. This is the Valley Brew sign here. Mark it parallel with this fence line?

Q. Yes. A. About 460 feet.

Q. I will mark that, if I may, representing the 460— A. About 460 feet.

Q. Can you identify in the lower diagram the buildings that are indicated there in the corner of the intersection; do you know what they are?

A. These buildings here? (Indicating.)

Q. Yes.

(Testimony of D. H. Talt.)

A. Well, a house and this was a barn here and this was an outhouse or shed of some kind, a small shed. I am not sure [238] what this is, but I have it in my notes.

Q. Will you keep your voice up, please?

A. I am not sure what this one is back here. The house was here. I think that is an outbuilding there.

Mr. Dunne: I have no further questions.

Mr. Myers: I have no questions, your Honor.

The Court: All right. Step down.

Mr. Dunne: Mr. Brady.

The Court: I think we better take a short recess before we call the next witness.

(Recess.)

The Court: Proceed.

DUDLEY T. BRADY

called by the defendant, sworn.

The Clerk: Will you state your name to the Court and jury?

A. Dudley T. Brady.

Direct Examination

Q. (By Mr. Dunne): What is your business, Mr. Brady?

A. I am claims adjuster for the Southern Pacific Company.

Q. How long have you been a claims adjuster for the Southern Pacific? A. Seven years.

Q. Are you such now? A. I am. [239]

Q. Where are your headquarters now?

A. They are at Oakland Pier.

(Testimony of Dudley T. Brady.)

Q. What were your headquarters in October, 1945? A. Oakland Pier.

Q. Mr. Brady, did you have occasion to take some steps toward investigating an accident, a crossing accident at Beckwith Road and the Southern Pacific Main Line from Modesto to Manteca, an accident that happened on the 11th of October, 1945? A. I did investigate the accident.

Q. In connection with that, did you take some photographs? A. Yes, I did.

Q. When were they taken, the first set?

A. The first set of photographs was taken the day following the accident, I believe.

Q. I show you a series of photographs in evidence here as Defendant's Exhibits A to I. These are all in evidence. Will you look at those quickly, please, and tell me if those photographs are photographs which you took as you have described.

A. Yes; I took these photographs, every one of them.

Q. When you took them, how did you take them; did you have your camera on a tripod or in your hand? A. In my hand, at eye level.

Q. Eye level when you are standing?

A. I was standing with the camera in my hands like this, at eye level on the road. [240]

Q. What was at eye level, where was your range finder? A. The finder is at eye level.

Q. Where is the lens, above or below that?

A. The lens is below the finder.

Q. I show you a photograph marked Defend-

(Testimony of Dudley T. Brady.)

ant's Exhibit L for identification. Did you take that photograph? A. Yes, I did.

Q. What does that represent?

A. This photograph is—in other words, I was standing the east side of Highway 99 facing north on the north lane of Highway 99 and to the left of this picture is the intersection of North Road and Highway 99.

Mr. Dunne: We offer the photograph in evidence as our exhibit next in order. That will be L.

(The photograph in question was thereupon received in evidence as Defendant's Exhibit L.)

Q. (By Mr. Dunne): On this diagram, the top is intended to represent Highway 99, in along here; the two lanes to the east, the island in the middle and the two lanes at the south and the railroad track; here is North Avenue and here Beckwith Avenue. Where were you, as far as the diagram is concerned, when that photograph was taken?

A. May I see that a minute? I was right about here.

Mr. Dunne: I will mark that with an arrow pointing to the spot; that is the spot indicated by the witness and I will mark [241] that L. That was taken looking——

A. Looking north on Highway 99.

Q. Toward Beckwith Road?

A. Toward Beckwith Road.

Mr. Dunne: I will put an arrow from the arrow I have indicated indicating the direction the photograph is looking.

(Testimony of Dudley T. Brady.)

Q. I show you Defendant's Exhibit M for identification and ask you if you can tell me what that is.

A. This picture was taken one-tenth of a mile north of the intersection of North Road and Highway 99 facing north along the north lane of Highway 99.

Mr. Myers: Pardon me, your Honor. What date was that?

Q. (By Mr. Dunne): What date were they taken?

A. These pictures were taken in May, 1947.

Mr. Dunne: I will mark the point that that shows, mark that M.

Mr. Myers: Pardon me, your Honor. This picture was taken in May, 1947. It is two years after this accident happened. We don't believe they would be relevant at all as showing the conditions that existed on October 11, 1945. I was under the assumption that these pictures were taken the day following the accident. That is why I have been sitting here not objecting to them.

Q. (By Mr. Dunne): Mr. Brady, how long have you been familiar with that territory down there? [242]

The Court: Well, the foundation should be laid showing the physical condition was not changed. I think counsel is doing that now.

Q. (By Mr. Dunne): How long have you been familiar with that stretch of road along there?

A. The last five years.

Q. Have you been along there frequently?

(Testimony of Dudley T. Brady.)

A. I have been along there very frequently.

Q. With respect to the layout of the highway itself, that is the lanes of the highway and the island, were the conditions there the same at the time these pictures were taken as they were in October, 1945?

A. Yes, I would say the condition would be the same.

Q. What is that condition with respect to trees and shrubbery that are shown in these various photographs? Were these conditions substantially the same?

A. The conditions were, in my opinion, substantially the same.

Mr. Myers: Your Honor, may I ask this witness some questions on this foundation for these photographs?

The Court: If you want to you may.

Q. (By Mr. Myers): Mr. Brady, on October 11, 1945, did you go out to the scene of this accident and make observations as to the surrounding territory?

A. Yes, I did.

Q. What day did you go out there?

A. The day following the accident. [243]

Q. And did you take pictures out there that day?

A. Yes, I did.

Q. What pictures did you take that day?

A. The pictures of the intersection and the immediate vicinity.

Q. Well, when you say immediate vicinity, you mean just pictures of the Beckwith Road and the railroad track, do you not?

A. That's right.

(Testimony of Dudley T. Brady.)

Q. Did you go down to North Avenue?

The Court: Just a minute. That is cross-examination. This is not voir dire. That is the danger of cutting in. You may ask these questions on cross-examination.

Mr. Myers: May I present this to your Honor?

The Court: Surely.

Mr. Myers: Just one thing. This witness has said the conditions are the same. I want to find out about it.

The Court: Well, that is cross-examination. That is not voir dire. You will have your opportunity and if you wish me to, I will withhold ruling or admitting these photographs until you have examined him on cross-examination.

Mr. Myers: Thank you, Your Honor.

The Court: Cutting in is difficult because it is very hard to draw the line between the two and it is easy to get over into cross-examination.

Mr. Myers: Thank you, Your Honor.

The Court: Go ahead. [244]

Q. (By Mr. Dunne): This is M and we will offer it as our next exhibit in order. I understand Your Honor is reserving your ruling.

The Court: I will reserve the ruling. I will rule later. It will be marked for identification.

Q. (By Mr. Dunne): That is Defendant's Exhibit M. I will show you this, Exhibit N for identification, and ask you if you took that photograph.

A. Yes, I did.

Q. What does it depict?

A. This photograph is—I was standing on the

(Testimony of Dudley T. Brady.)

north lane of Highway 99 two-tenths of a mile north of the intersection of North Road and Highway 99.

Q. Are the things shown in that photograph—I call particular attention to the trees, shrubbery, growth, position of the highway—substantially the same as they were in October, 1945?

A. Yes, they are substantially the same as at the time of this accident.

Q. Obviously, the trees grow in the meantime to some extent. A. Correct.

Mr. Dunne: We offer that as our exhibit next in order; that is N.

The Court: I will reserve ruling on it.

Q. (By Mr. Dunne): I show you Defendant's Exhibit O for identification and ask if you can tell me what that is. [245]

A. This picture was also taken from the north lane on Highway 99 facing north, three-tenths of a mile north of the intersection of North Road and Highway 99.

Q. Were the conditions shown here substantially the same as in October, 1945? A. They are.

Q. I show you Defendant's Exhibit P for identification. What is that?

A. This picture is also taken on the north lane of Highway 99, facing north, one-half mile north of the intersection of North Road and the Highway 99. To the right of the picture represents Dale Road.

Q. Are the things shown and depicted in that

(Testimony of Dudley T. Brady.)

picture as you hold it before you substantially the same as they were in October, 1945?

A. They are.

Mr. Dunne: We will offer this as our next exhibit in order.

The Court: I will reserve a ruling.

Q. (By Mr. Dunne): Finally, Defendant's Exhibit Q for identification; what is that?

A. This photograph was taken at the intersection of Dale Road and Highway 99 and is facing north; at the east edge of the north lane on Highway 99 there is shown Dale Road branching off to the right and Highway 99 is to the left of the photograph. [246]

Q. Does that photograph as you have it before you substantially represent conditions as they existed in October, 1945? A. Yes.

Mr. Dunne: We will offer that as our exhibit next in order.

The Court: Ruling reserved.

Q. (By Mr. Dunne): I show you another photograph which is not yet marked and ask you if you will tell me what that is.

A. This photograph faces, I would say, generally a north direction on Dale Road and I was standing approximately 50 feet east of the north lane of Highway 99.

Q. Is what is depicted in that photograph substantially representative of the conditions as they existed in October, 1945? A. Yes.

Q. With that photograph before you and Defendant's Exhibit Q for identification, can you tell

(Testimony of Dudley T. Brady.)

me where the camera was when those photographs were taken; was it in the same place or had you shifted position?

A. The camera was at the same location, only I had shifted my position towards the left to reveal the entire intersection including Dale Road and Highway 99.

Q. In other words, so there is no question about it, it shows a panoramic sweep of that intersection?

A. It does, yes.

Mr. Dunne: We offer it and since your Honor is reserving [247] the ruling, it should be now marked for identification.

The Court: Mark it for identification.

(The photograph marked Defendant's Exhibit T for Identification.)

Q. (By Mr. Dunne): Mr. Brady, with Defendant's Exhibit T for identification before you, I want to show you now three photographs which I have clamped together and ask you whether or not you took those three photographs.

A. Yes, I did.

Q. Where was the camera as to its location at a point on the ground when those three photographs were taken, was it in the same position in all three?

A. Yes, it was. The three photographs were taken at the same location. In other words, I just pivoted in taking the three distinct pictures.

Q. So that when pieced together as is indicated in the photograph before you——

A. That is right.

(Testimony of Dudley T. Brady.)

Q. They make three photographs showing substantially the conditions as they existed in October, 1945? A. Yes, they do.

Q. I would like to tie those in with Defendant's Exhibit T for identification. Is there anything on Exhibit T for identification which shows the intersection or part of the crossing of Dale Road and Highway 99 that ties in with anything on these [248] three photographs that have been pieced together? Perhaps before you answer that, so I can do it properly on the record, let me take those three photographs. I will offer them in evidence and ask that they be marked so we can identify them.

The Court: All right. It will be Defendant's Exhibit U for identification. I will reserve a ruling.

(Photographs pieced together were thereupon marked Defendant's Exhibit U for Identification.)

Q. (By Mr. Dunne): Exhibit U, the three photographs pieced together, is there anything on there that serves to tie that in with anything on Exhibit T for identification?

A. By referring to Exhibit T, there is an automobile part on the right lane of Dale Road and referring to Exhibit U—is that right?

Q. Yes.

A. U, on the right side of this panoramic picture you will see the left front fender of an automobile, which is the same automobile as in Exhibit

(Testimony of Dudley T. Brady.)

T, and this first picture was taken facing north on Dale Road. Then I would pivot to get the area in the next picture and then I would pivot further, and there is a picture of a telephone pole. This telephone pole is devoid of any placards or signs.

Q. Now you are talking about Exhibit U?

A. I am talking about Exhibit U. This third picture, Exhibit U, the pole on the picture is devoid of any placard whereas by [249] referring back to Exhibit T, it will be noted on the lefthand there is a placard on the first pole and this second pole is devoid of any placard.

Q. The pole is the pole that shows to the extreme left as you look at it, of Exhibit U.

A. This pole is the second pole from the intersection of Dale Road and Highway 99.

Q. It is the second pole that shows up in Defendant's Exhibit T?

A. Correct. The pole in this picture is the second pole in this picture (indicating). [250]

Q. On Exhibit U the second pole has been indicated as marked, is that correct?

A. That is correct.

Q. Likewise at the top there is an arrow pointing down and pointing to "Valley Brew sign." Do you recognize in the distance the Valley Brew sign?

A. Yes, I can see the Valley Brew sign, the back part of the Valley Brew sign.

Q. There is also indicated at the top with an arrow pointing down, "Gas Station." What gas station is that?

(Testimony of Dudley T. Brady.)

A. That is correct. That is what we have called the Texaco Gas Station. I understand——

Q. Not what you understand, but just where it was located.

A. There is a Texaco Gas Station located opposite the Beckwith Road crossing.

Mr. Dunne: I have no further questions.

Cross-Examination

Q. (By Mr. Myers): Do I understand, Mr. Brady, that you are an investigator employed in the office of the Claims Department of the Southern Pacific Company?

A. No, I am a claim adjuster for the Southern Pacific Company.

Q. Are you a photographer, too?

A. Well, I can take pictures, but I am not——

The Court: Q. You are not a professional?

A. I am not a professional photographer. [251]

Mr. Myers: By the looks of the pictures, he is a good amateur, anyway, your Honor.

The Witness: Thank you.

Q. (By Mr. Myers): You went to the scene of this accident the day following, is that correct?

A. That is correct.

Q. Did you go down there that day to take pictures or to investigate?

A. We went down to investigate the accident and to take photographs.

Q. In other words, to do both?

A. That is correct.

Q. When you went down there that day——

(Testimony of Dudley T. Brady.)

Mr. Dunne: Mr. Brady, will you keep your voice up? I have trouble hearing you.

Mr. Myers: No trouble hearing me, I take it?

The Court: He is asking the witness.

Q. (By Mr. Myers): When you went down that day to take photographs, will you just pick out from this group, here, which are in evidence, the ones that you took the day following the accident when you were down there? Which is the group that you took?

A. This is the group of pictures I took the day following the accident (indicating).

Q. In looking at this group of pictures, will you tell his [252] Honor and the jury what is the farthest point you were from the railroad tracks at Beckwith Road, at any time when this group of pictures was taken the day following the accident?

A. Do you want me to take the distance on each one of these pictures?

Q. No, I do not want to be that exact about it. I want the maximum distance you were away from the railroad tracks at Beckwith crossing on the day following the accident when you took that group of pictures, any of them?

A. This picture here is——

Q. Pardon me. I do not mean to have you go through them one by one.

The Court: He wants a general idea as to all.

The Witness: As to all of them?

The Court: Yes.

The Witness: This one here is about 600 feet

(Testimony of Dudley T. Brady.)

west of the crossing, the Beckwith Road crossing.

Q. (By Mr. Myers): In other words, this is down Beckwith Road looking up at the crossing?

A. That is right, facing east on Beckwith Road.

The Court: Identify that for the records; I mean the exhibit number.

The Witness: Exhibit A.

Q. (By Mr. Myers): That is looking east on Beckwith Road 600 feet down. All right. [253]

A. Exhibit B was 300 feet from the crossing proper of Beckwith Road facing east.

Q. In other words, down the same road, or facing east?

A. Right. This picture was on the north edge of Beckwith Road 300 feet from the crossing proper.

Q. Practically the same position except 300 feet from the crossing, is that right?

A. That is right, only on the north edge of the highway. This one was taken from the center of Beckwith Road 200 feet from the crossing proper.

Q. So far we are all on Beckwith Road now looking down to where this accident happened on the right of way?

A. That is right. This one was taken at the north edge of Beckwith Road, 200 feet from the crossing proper.

This was also taken on the north edge of Beckwith Road 125 feet from the crossing proper.

This was taken from the center of Beckwith Road facing east 75 feet from the crossing.

This one was taken on the north edge of Beck-

(Testimony of Dudley T. Brady.)

with Road, 75 feet from the crossing proper, facing about southeast along the railroad right-of-way; in other words, facing towards Modesto.

Q. You are still in the vicinity of Beckwith Road facing northeast? A. No, south. [254]

Q. Southeast?

A. Let's see. Is this the railroad tracks?

Q. I think that is the railroad.

A. This was taken right here (indicating). That is Exhibit H.

Mr. Dunne: May I suggest again, Mr. Brady, when you and Mr. Myers are having a private conversation there I can't hear, and I do not think the jurors hear.

Q. (By Mr. Meyers): Up to the present point in these exhibits they are all taken from Beckwith Road looking either east or southeast. The last one was a little southeast, is that right?

A. This is southeast.

Q. That is Exhibit H?

A. Exhibit H. This is Exhibit I, facing southeast along the railroad right-of-way, 75 feet from the crossing.

Q. You are still in the vicinity of Beckwith Road, 75 feet from the crossing, is that right?

A. Correct.

Q. All right.

A. Exhibit J is facing north along the railroad right-of-way, six rail lengths from Beckwith Road, showing the approach of the train involved.

Q. In other words, this is looking what?

(Testimony of Dudley T. Brady.)

Towards Modesto or towards San Francisco? [255]

A. This is looking towards Manteca.

Q. That would be toward San Francisco?

A. Facing north.

Q. And looking right along the railroad track?

A. Six rail lengths from Beckwith Road.

Q. That is Exhibit J, is that right?

A. Yes. Exhibit I is taken three rail lengths south of Beckwith Road crossing, showing——

Q. In other words, three rail lengths down this way toward Modesto facing north, is that right?

A. Yes, right here on the railroad track.

Q. Facing north?

A. Facing north. That is three rail lengths. Exhibit 2 was taken approximately 25 feet from the railroad tracks or crossing proper on the south edge of Beckwith Road, facing south along the railroad right of way.

Q. About in this position?

A. Right about here (indicating).

Q. And that is facing down the right-of-way?

A. Facing right straight down the right-of-way. This is Exhibit 3, taken on the south edge of Beckwith Road, approximately 50 feet from the crossing proper.

Q. So you are still in the vicinity of the crossing here on Beckwith Road?

A. That is right. [256]

Q. Within 50 feet of it?

A. 50 feet of the crossing proper. This is Exhibit 7.

Q. Did you take those pictures now, Exhibit

(Testimony of Dudley T. Brady.)

7, or were your pictures limited to the ones lettered? A. I took these pictures.

Mr. Myers: All right. Your Honor, there is no point in it, and I do not want to confuse the witness. The ones that are numbered are our exhibits and the pictures that we had taken.

The Court: He has identified them, anyway. He evidently knows the locality.

Mr. Myers: That is right.

The Court: If you do not want to examine him as to those——

Mr. Myers: I do not want to take the time on it, because all I am trying to find out is where he was on this particular day.

The Court: Let the rest of them go, because they are photographs. You seem to know the locale. He does not want to check any except those that you took, yourself.

Q. (By Mr. Myers): Look on the back of those, and if they have numbers on them we will pass those, because they are plaintiffs' exhibits.

A. I can see that. I can see they are marked Plaintiffs' Exhibits. Evidently I did not take that picture.

The Court: Let me look at them. [257]

The Witness: This is Plaintiffs' 9.

The Court: We are wasting time. All of these are plaintiffs' Exhibits.

Mr. Meyers: All right.

The Court: There is no use to waste time.

Q. (By Mr. Myers): Mr. Brady, did you ever

(Testimony of Dudley T. Brady.)

go to the scene of this accident any time after that for taking pictures until 1947?

A. Would you repeat that question?

(Question read.)

A. No.

Q. And it was what time in 1947 that you went there?

A. The middle part of May, 1947.

Q. What month was it again in 1947.

A. May, 1947.

Q. Will you just take these? In order to save time, take each one of these exhibits, and with your pencil show the jury where you were with your camera when you took each one of these pictures marked for identification. Take your pencil or take a pointer and show where you were.

A. I took this photograph right here (indicating).

Q. What number is that?

A. This is Defendant's Exhibit Q.

Q. The next one is what?

A. Defendant's Exhibit P. [258]

Q. Where were you when you took that one?

A. I took this photograph approximately here (indicating).

Q. In what direction was your camera facing there?

A. It was facing north on Highway 99.

Q. Incidentally, in Q your camera was facing in what direction?

A. Well, it was facing in a general north direction. I would say it is north.

(Testimony of Dudley T. Brady.)

Q. Your next exhibit?

A. This is Defendant's Exhibit O: .3 of a mile north of the intersection of North Road and Highway 99. I would say it was taken approximately right here (indicating).

Q. That number is what?

A. Defendant's Exhibit O.

Q. And your camera was facing in what direction?

A. Facing north in the north lane of Highway 99.

Defendant's Exhibit N was .2 of a mile north of the intersection of North Road and Highway 99. It was taken, I would say, approximately here (indicating).

Q. That is number what?

A. Defendant's Exhibit N.

Q. And your camera was facing in what direction?

A. Facing north on the north lane of Highway 99.

Defendant's Exhibit M was taken .1 of a mile north of the intersection of North Road and Highway 99, facing north on Highway 99. It was taken about—it was taken approximately here (indicating).

Q. And that number is what, sir? .

A. Defendant's Exhibit M.

Q. Defendant's Exhibit M, and your camera is facing in what direction?

A. North on Highway 99. This photograph was taken, Defendant's Exhibit T, facing, I would

(Testimony of Dudley T. Brady.)

say, northeast along Dale Road, at the intersection of Dale Road and Highway 99.

Q. Approximately the same position as Q?

A. Approximately the same position as Q.

Q. Except facing—

A. It was taken right about here.

Q. That is T, and your camera was facing in what direction here? A. Facing northeast.

Q. The direction that Dale Road runs?

A. Facing right along Dale Road.

Q. All right. What is your next one?

A. Defendant's Exhibit U, the panoramic taken approximately 100 feet north of the intersection of Dale Road and Highway 99.

Q. Is that about where you have the circle drawn there?

A. No, I would say right about—well, right about here (indicating).

Q. And that is Exhibit U? [260]

A. Defendant's Exhibit U.

Q. And you faced three directions in that exhibit, did you not?

A. It is a panoramic shot.

Q. There were three directions; the direction of Dale Road was one of them?

A. Yes, there was the direction of north and, you might say, northwest. [260-a]

Q. North, northwest and what else?

A. Two of them were taken about north and then the other one was about northwest.

Q. You have three there, have you not?

A. Yes.

(Testimony of Dudley T. Brady.)

Q. So you have two of them about north, you say, and the other about northwest, is that right?

A. Approximately, a little more this way.

Q. A little more west then?

A. Northwest. It would be over this way.

Q. Mr. Brady, let me ask you: Did you ever go to the positions that you have marked at L, M, N, O, P, Q, T and U on this map the day after this accident happened when you were down there taking the original pictures?

A. Yes, I drove along that same route the day following the accident.

Q. Did you stop in each and every one of those positions and face the direction that you had your camera facing in 1947 when those pictures were taken?

A. No, I didn't stop.

Q. You didn't stop. So as a matter of fact, you are unable to say whether or not the conditions are the same in 1947 when you took those pictures in those positions as they were the day following the accident?

A. I would say the conditions are relatively the same when I [261] took the pictures in 1947 as they were when the accident occurred.

Q. How about the foliage? Would you expect more foliage in May in the year or in October of the year?

A. Well, I would say the foliage would be about the same in October.

Q. You would expect the leaves to be falling from those trees in October?

The Court: You don't know that climate. That is a tropical climate.

(Testimony of Dudley T. Brady.)

Mr. Myers: I was raised in Merced, your Honor.

The Court: They do not begin to fall in October.

The Witness: They don't fall. I would say they are the same.

Mr. Myers: I was raised on a farm near Merced.

The Court: Your recollection and my recollection may not be the same, so go ahead and inquire.

Q. (By Mr. Myers): In any event, with reference to foliage on those trees, you are unable to say that the foliage was the same in 1947 as it was the day following this accident?

A. I would say the foliage was relatively the same.

Q. The trees had not grown any in those last two years?

A. Well, possibly grown a little, not much.

The Court: Just a moment. The witness had not finished his answer. He did not know whether that was a statement or a [262] question.

Q. Had you completed your answer.

A. I said possibly they may have grown an inch or so, their branches. That is kind of hard to say definitely.

Q. (By Mr. Myers): What kind of trees were those growing in this vicinity where you took those pictures.

A. They are gum trees, to my recollection, and oleander bushes.

Q. Gum trees and—

A. That is my recollection; possibly a few gum trees and there may be what they call bay trees.

(Testimony of Dudley T. Brady.)

Q. And that was your observation on October 12, 1945, and that was your observation in May 1947, that they were gum trees and oleander bushes?

A. That is right.

Q. When you went out in 1947 and took those pictures from the positions that you have indicated, did you by any chance from those same positions turn your camera across Highway 99 towards the railroad track and take any pictures?

A. Will you repeat that question?

(Question read.)

A. Yes, I did.

Q. Where are those pictures?

A. In 1947—some pictures are not here. This picture is facing toward the railroad tracks. This is taken in 1947, Defendant's Exhibit L. [263]

Q. That is in evidence? A. Yes.

Q. This is L here, is that right (indicating on diagram)? In answer to Mr. Dunne's question—

The Court: Yes, he placed the location there.

Q. (By Mr. Meyers): That is L, and then you placed, I believe, an arrow here showing the direction the camera was facing, and the camera at that time, you stated just a moment ago, was facing in a general westerly direction, was it not, northwesterly direction along the railroad tracks?

A. It was facing in a general northerly direction.

Q. Mr. Witness, here is your arrow on this map. It was facing in a general northerly direction; it was pointing this way, it was not pointing toward the tracks, was it?

(Testimony of Dudley T. Brady.)

A. That was my memory. At the time I stated I overlooked the compass mark.

Q. What is the fact?

A. That is my impression of the direction.

Q. What is the fact as to the direction your camera was pointed?

A. The actual fact, according to the compass mark there, is northwest.

Q. In other words, it is pointed up Highway 99?

A. Up Highway 99 and toward the railroad tracks.

Q. This arrow then should swing a little bit toward the [264] railroad tracks?

A. It would be northwest, over this way here (indicating).

Q. Did you take any others that were pointed over to the railroad tracks?

A. Yes, I did.

Q. Will you show me those photographs, please.

A. Well, they are not here. There are some others.

Mr. Dunne: They are right here if you want them. I didn't put them in evidence. There are two taken down on North Road.

The Court: Counsel has indicated he has them and has not offered them yet.

The Witness: There is the panoramic shot.

Q. (By Mr. Myers): That is U. That is the one you took from over here at position U, and that was pointed northwesterly and more westerly. In other words, your three positions, is that right?

A. The three positions I mentioned before, one

(Testimony of Dudley T. Brady.)

this way, and the other picture was taken this way, and the third picture was taken this way (indicating).

The Court: Both of you are covering the jurors.

The Witness: Pardon me.

Mr. Myers: Let's see Exhibit U.

The Court: Why don't you have him indicate the direction for each portion of that exhibit U, being a panoramic picture? [265] Will you do that, Mr. Witness?

The Witness: Defendant's Exhibit U. The camera is facing north and northwest along Dale Road, Highway 99, and the railroad tracks, covering this area in here (indicating).

Q. (By Mr. Myers): In other words, you faced west on that, too?

A. Faced north and the other two pictures, northwest.

Q. Did you take any other pictures between your point L and your point U facing from Highway 99 towards the railroad track?

A. Yes, I did.

Q. Is this one of them?

A. This is not marked.

The Court: We will mark it if you answer that question.

The Witness: This is facing——

Q. (By Mr. Myers): Just point where it was taken from.

A. It was taken from the east edge of Highway 99 facing west along North Road, which you see in the background.

(Testimony of Dudley T. Brady.)

Q. Facing along North Road, is that right?

A. Yes.

Q. Make an arrow so it is facing down North Road, is that correct? A. That is correct.

Mr. Myers: I guess that should be marked, your Honor.

The Court: Do you want to offer it?

Mr. Myers: I have no purpose to offer it, excepting as to put a mark on it next in order. [266]

The Court: If you are not going to offer it, what is the use of examining the witness about it?

Mr. Myers: I will offer it. There is no reason for me not offering it, just as long as it has a number, that is all.

The Court: You will take it as yours, won't you?

Mr. Dunne: Certainly.

The Court: Give it a defendant's number.

Mr. Myers: We will offer it in evidence, your Honor.

The Court: We will put it in as Defendant's exhibit and keep the continuity that way.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit V.)

Mr. Myers: Q. From the position of your camera when this picture was taken, you have a perfectly open view toward the railroad track?

A. Defendant's Exhibit V is an open view directly opposite the intersection of North Road and Highway 99.

Q. Where else were you when you took any of

(Testimony of Dudley T. Brady.)

the pictures between L and, I am sorry, your Honor, the number of this is what?

The Court: V.

Mr. Myers: Q. —V, and you had better label this on the map as being point V. In between point V and the point Q, where else were you when you took pictures toward the railroad tracks in 1947?

A. I am certain the pictures I took were along here, which showed the railroad right-of-way, the tracks. [267]

Mr. Myers: May I ask, your Honor, if counsel has that picture?

Mr. Dunne: As far as I have any knowledge, there are three taken on North Road west of the railroad track. They would not respond to your inquiry. There is another one taken indicating the intersection of Highway 99 and Dale Road which would be the third. Of two that are taken here, one looking over toward the railroad track—I have two others here taken along Highway 99 but one along Dale Road looking in the direction of the railroad track (handing photographs to counsel).

Mr. Myers: This photograph was taken from where?

A. It was taken on the east edge of Highway 99 at the intersection of Dale Road and Highway 99 facing northwest—

Q. Show us here (referring to the diagram).

A. Right about here (indicating).

Q. Facing this direction, northwest. We will make an arrow facing that direction.

(Testimony of Dudley T. Brady.)

The Court: That has not been marked. We will mark that X.

Mr. Myers: W.

The Court: Yes, W. I forgot; we did not have a W. Put a W on it. The Clerk will mark it.

(Photograph was thereupon marked Defendant's Exhibit W for identification.)

Mr. Myers: Q. This last one that counsel gave me is a picture of what? [268]

A. This photograph is looking southwest from this point here, southwest at the intersection of North Avenue or North Road and Highway 99. In other words, it is on the west side of Highway 99, out here.

Q. All right. That would be X, your Honor.

The Court: Yes; mark that.

(Photograph was thereupon marked Defendant's Exhibit X for identification.)

Mr. Myers: Q. And in what direction was your camera facing then?

A. It was facing southwest.

Q. Southwest. Was that this direction here?

The Court: Hand that to the Clerk.

Mr. Myers: Q. Those are all, Mr. Brady, pictures at least that you have been shown that were taken from along 99, that were taken over toward the railroad tracks in May, 1947?

A. Yes. Those are the pictures that I explained.

Q. So you did not take any pictures between V or L and P in 1947 pointing towards the rail-

(Testimony of Dudley T. Brady.)

road track? A. Between V and P?

Q. V and L. Pardon me. Between V and P—between the V and P you took no pictures from Highway 99 at any point in there with your camera pointing over to these trees towards the railroad track.

A. I believe these pictures would be of the railroad track. [269]

Q. Yes, but you have marked them. You marked one here and then you marked another one in here; is that right? A. That's right.

Q. But between P and V you did not take any pictures pointing toward the railroad track?

A. Not pointing directly toward the track, but I pointed north along Highway 99 which reveals the track at the other direction.

Q. As a photographer, you know if you have some trees like that, if you take a picture looking in the direction the row of trees is, you get a more solid picture than if you take a photograph crosswise. A. True.

Mr. Myers: That is all.

Redirect Examination

Mr. Dunne: You get the same effect as a driver driving along the highway could, don't you, if you are traveling along the highway? A. Yes.

Mr. Dunne: No further questions.

The Court: At this time I reserved ruling on those photographs. Unless there is any further objection I am ready to rule.

Mr. Myers: No, your Honor. My only objection

was the conditions are not the same. That was the objection. [270]

The Court: Well, that goes to the weight. The witness has testified that in his recollection and being familiar with the places that there has been no substantial change except the possible intimation there may have been some leaves early when he took the pictures and the trees might have grown. That goes to the weight. You can argue that for that jury. The objection will be overruled. The exhibits which have been marked for identification—how far have we gone? We went as far as U. Where did we begin?

Mr. Dunne: I think we begin with L.

The Court: They will be received in evidence and given the proper numbers.

(Defendant's Exhibits L through X, inclusive, were thereupon received in evidence.)

The Court: Will you indicate who your next witness is going to be so the bailiff will have him available here when we begin?

Mr. Dunne: Our next witness, I think, will be Mrs. Krebs.

The Court: Will you tell the lady to be right here at 2:00 o'clock.

Ladies and gentlemen, we are about to take adjournment until 2:00 o'clock this afternoon. The Court admonishes you not to talk about this case among yourselves or anyone else and not to form an opinion until the case is finally submitted to you.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [271]

Afternoon Session, Thursday, July 22, 1948,
2:00 o'clock

The Court: Proceed, gentlemen. I am sorry I was delayed. I haven't left my chambers since we adjourned.

IZETTA N. KREPPS

called by the defendant, sworn.

The Clerk: Q. Will you state your name?

A. Izetta N. Krepps.

Direct Examination

Mr. Dunne: Q. Mrs. Krepps, where do you reside? A. I live on Curtis Road now.

Q. Where did you live in October, 1945?

A. On Beckwith.

Q. A little bit outside of Modesto?

A. Yes; that's right.

Q. Mrs. Krepps, I want to show you—I don't know whether you will understand these two diagrams here—this diagram, these lines going in through here are supposed to represent Highway 99. These two lines here with the red line between them are intended to represent the Southern Pacific Railroad tracks. These lines down here are intended to represent Beckwith Road. Over on the far side of Beckwith Road these squares are intended to represent various buildings and the same below, on the diagram below the tracks; these various devices are intended to [272] represent buildings. Is the place where you were living shown on that

(Testimony of Izetta N. Krepps.)

diagram? A. Yes, it is.

Q. Which place was it, Mrs. Krepps?

A. I think it would be this one, right here.

Q. I will mark that. I will mark that with a K. This Defendant's Exhibit C, a photograph. I wonder if you recognize that.

A. Yes, I do. That is the grape vines along the Beckwith Road.

Q. Along the fence by your property?

A. No. These grape vines are the ones that Ben Brubaker had that adjoins onto our place.

Q. In the background just barely behind the trees is shown the roof of a house.

A. Yes, that is my house.

Q. That is your house. Do you recall an accident, a collision between a Southern Pacific engine, locomotive engine, and an automobile in which there were some members of the Souza family on the 11th of October, 1945? A. Yes, I do.

Q. Calling your attention to that day, Mrs. Krepps, where were you; were you at home on that day?

A. Yes, I was. It was in the morning.

Q. Did you learn of the accident that morning?

A. Yes. [273]

Q. How did you learn of the accident?

A. Well, I was out at the wash house washing clothes and I come around the hedge to the clothes line and went to hanging my clothes and I heard the train whistle and it whistled and whistled and then I heard it crash and I run around the corner of the house and saw the car.

(Testimony of Izetta N. Krepps.)

Q. This lower diagram, Mrs. Krepps, is on a different scale but it is intended to represent the intersection there and these heavy squares down toward the bottom are intended to represent various buildings. It has been intended, and I don't want to suggest this to you, I want you to tell me, which of the various buildings, if you know from the placing of them there, was your house.

A. My house?

Q. Yes. I mean if you can tell from the diagram. I want you to show it if you can tell it but if you can't tell from the diagram I want to find out. Which was the house and where were you washing and where was the clothesline?

A. I would say that one down there at the bottom was my house—no, the next one down there—right where your hand is.

Q. This? A. Yes.

Q. Where was the wash house?

A. The wash house was about where that line, the little circle is—do you see that right there?

Q. Right there? A. Yes.

Q. I will draw a line and mark that W.

Q. What kind of a day was it?

A. It was a nice day, nice, clear morning.

Q. Was there any fog, rain or haze?

A. No.

Q. Did you notice, or can you tell us anything about the bell on the locomotive, whether that was ringing or not?

A. No, I don't. I don't remember any bell.

(Testimony of Izetta N. Krepps.)

Q. Did you actually see the locomotive and the automobile come together? A. No, I did not.

Q. Are you able to tell us and if you can't, please say so, anything about the speed, how fast the locomotive was going?

A. No, I couldn't say that.

Q. Aside from you and your immediate family, was anybody else living there at the time with you?

A. My daughter was there with me.

Q. What is her name?

A. Melvina Disbrow.

Q. She was married? A. Yes.

Mr. Dunne: I have no further questions. [275]

Cross-Examination

Mr. Myers: Q. Mrs. Krepps, at the time of the happening of this accident you were hanging out your clothes, were you not?

A. That is right.

Q. Your clothesline was located in your back yard on the south side of your house, is that correct? A. That is right.

Q. While you were hanging out your clothes you heard a train whistle, is that true?

A. That is right.

Q. And you could not tell from the whistle how far the engine was from the intersection when you heard it, could you? A. No, I could not.

Q. In the middle of one of the whistles you heard a crash, isn't that true? A. Yes.

Q. And then you ran around to the north side

(Testimony of Izetta N. Krepps.)

of your house and looked toward the crossing, is that correct? A. That is right.

Q. And you saw the car?

A. I saw the car up against the post.

Q. It was all smashed up, is that right?

A. Yes.

Q. These whistles that you heard were two or three short blasts [276] of the whistle, is that true?

A. That was after the crash. Then rang three short whistles after it hit.

Q. But in the middle of one of the whistles you heard this crash? A. Yes.

Q. There was no difference between the whistle, in the middle of which you heard the crash, and the whistle that you heard after the crash, was there?

A. Well, I don't know. I know there was whistling and all at once I heard the crash, and then it whistled, I think, three times after that.

Q. How many times did it whistle before that?

A. Gosh, it was whistling when it was coming down the track before the crash.

Q. You recall that there was more than one whistle?

A. Yes, there was more than one whistle.

Q. Do you recall, Mrs. Krepps, a young man by the name of Glenn Griek, who called on you on October 29, 1945, and discussed this case with you?

A. Was that for the Southern Pacific Company?

Q. What is that?

(Testimony of Izetta N. Krepps.)

A. Was that for the Southern Pacific or for Souza, the man who called on me?

Q. Do you remember a gentleman by the name of Mr. Griek?

A. No, I know there was a young fellow who came there for [277] Souza, too, and talked to me.

Q. On October 29th?

A. I don't know just when it was.

(Mr. Myers handed a statement to Mr. Dunne.)

Mr. Dunne: You may read that. I have no objections.

Mr. Myers: Q. Mrs. Krepps, is this your signature at the bottom of this page (indicating)?

A. It looks like it.

Q. And is this your signature on the second page? A. It looks like it.

Q. Do you recall on October 29th Mr. Griek took a statement such as this?

A. I guess that is right, but I don't remember signing that. But I remember the fellow coming there and talking to me.

Q. That is your signature, isn't it?

A. Yes, it looks like my writing, all right.

Mr. Myers: I will offer that in evidence, your Honor, as Plaintiff's Exhibit next in order.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 11.)

(Testimony of Izetta N. Krepps.)

Mr. Myers: I would like to read it, if your Honor please.

The Court: After you have completed with the witness.

Mr. Myers: Q. Mrs. Krepps, where you live, or where you lived at the time of the happening of this accident, is only a very short distance from the railroad tracks, is that right? [278]

A. That is right.

Q. And engines and trains frequently pass there? A. Yes.

Q. Do you know when it was that you left that locality?

A. It was in April, I think, the 5th or 6th of April of last year.

Q. You discussed this case with someone from the Southern Pacific Company, too, did you not?

A. That is right.

Q. Was that before or after the time this statement was given? A. Before that one.

Q. In other words, this statement was taken on October 29th. Before that time you had talked to someone of the Southern Pacific Company, is that right? A. Yes.

Mr. Myers: I would like to read this, your Honor.

The Court: Go ahead.

Mr. Myers (Reading): "I am Szetta Krepps, of Route 2, Box 1170, Modesto, California. Referring to an accident that happened on the Beckwith Road and the Southern Pacific Railroad on October

(Testimony of Izetta N. Krepps.)

11, 1945, at about 9 a.m., involving a coupe driven by John M. Souza, of Modesto, and a switch engine of the Southern Pacific Railroad, I state I was working around my house on the above mentioned date and the above mentioned time, hanging out clothes. My [279] house is located at the corner of Beckwith Road and the 99 Highway in the southwest corner. My clothesline is in my back yard or on the south side of the house. I heard a train whistle. I couldn't tell how far the train was from the intersection by the whistle. In the middle of one of the whistles, I heard a crash. I ran around to the north side of my house and looked toward the crossing. I noted a car all smashed up on the northeast side of the tracks. I couldn't see the train, as it had gone on down the tracks. About two minutes later the train backed up to the scene of the accident. I saw a lot of people running to the scene to help the people out of the car. I didn't go to the scene of the accident.

"I have read the above statement of one page and believe it to be a true and correct statement to the best of my knowledge.

Szetta M. Krepps."

Mr. Myers: That is all.

Mr. Dunne: I have no questions.

The Court: Step down, Mrs. Krepps. These witnesses may be excused to return to their work.

MELVINA DISBROW,

called as a witness on behalf of defendant; sworn.

The Clerk: Q. Will you state your full name?

A. Melvina Disbrow.

(Testimony of Melvina Disbrow.)

Direct Examination

Mr. Dunne: Q. Mrs. Disbrow, where do you live?

A. I live at M.G. 6, Veterans Court, Modesto.

Q. Where were you living in October of 1945?

A. I was living at Route 2, Box 1170, Modesto.

Q. Are you any relation to Mrs. Krepps, who just left the courtroom?

A. I am her daughter.

Q. Where were you living with respect to your mother in October, 1945?

A. I was living with my mother.

Q. At her home? A. At her home.

Q. Where was that?

A. At Beckwith and 99 Highway. It is the first house on the left.

Q. The first house on the left as you turn from 99 into Beckwith?

A. From 99 into Beckwith.

Q. Do you recall the occasion when there was a collision at that crossing, the Beckwith crossing and the railroad tracks, between a Southern Pacific engine and an automobile, in which there were some members of the Souza family? A. Yes.

Q. Where were you at the time that accident happened? [281]

A. I was up in my bedroom in bed.

Q. We do not want to inquire unnecessarily into your affairs, but to know what you were doing, do you recall what you were doing at the time of the accident? A. I was reading a book.

(Testimony of Melvina Disbrow.)

Q. What, if anything, first called your attention to the fact that there was an accident?

A. My attention was drawn from my book by the insistent whistling of the train. The train whistled more than it usually did when it made the crossing there, and I heard a crash, but I didn't pay too much attention to it until my mother called me and said there had been an accident.

Q. Did you go to the scene of the accident?

A. I went out on the road. I didn't go too near it.

Q. Of course, you did not see the accident, itself?

A. No.

Q. Did you see the train before the accident?

A. No.

Q. Can you tell us whether or not the bell on the locomotive was ringing?

A. No, I didn't hear the bell.

Mr. Dunne: I have no further questions.

Cross-Examination

Mr. Myers: Q. Did you ever, while you were in your bedroom, hear a locomotive go by ringing a bell? [282]

A. I don't remember. It has been so long since I have lived there, and we got so used to the trains going by we never paid much attention to them.

Q. And you got used to train whistles, as well as bells, didn't you? A. Yes.

Q. So that a train whistling or a bell ringing on a locomotive wasn't any unusual occurrence?

A. No.

(Testimony of Melvina Disbrow.)

Q. Mrs. Disbrow, whom have you talked this case over with? A. My friends, Mr. Dunne.

Q. Who first talked to you from the Southern Pacific Company about the whistle blowing?

A. Well, a Mr. Aguer, I think his name is, came and got a statement from us.

Q. That was the same day, or the next day after the accident happened? A. Yes.

Q. And then after that whom did you talk to about the whistle blowing?

A. Well, I don't think I talked to anyone. Mr. Brady came and asked us if we would come up for the trial, but he never mentioned anything about the whistling.

Q. Mr. Who did? A. Mr. Brady. [283]

Q. Mr. Brady asked you to come up to San Francisco to be a witness in the trial?

A. Yes.

Q. When did you come up to San Francisco?

A. Tuesday.

Q. Since that time have you discussed your testimony with anyone? A. No.

Q. You have not talked to anyone at all about the whistle?

A. Well, we talked in the lawyer's office Tuesday night. We read over our statements that we had given before.

Q. You went over your statements; you and your mother were together at the time?

A. Yes.

Mr. Myers: I think that is all.

(Testimony of Melvina Disbrow.)

Mr. Dunne: I have no further questions.

The Court: The witnesses may remain in the courtroom, if they wish, or they may be excused.

CLAIRE L. BROWN

called by the defendant, previously sworn.

The Clerk: Mr. Brown, you have been heretofore sworn?

The Witness: Yes.

Direct Examination

Mr. Dunne: Q. Your first name?

A. Claire L. Brown.

Q. Where do you live, Mr. Brown?

A. Beckwith Road.

Q. What is your business?

A. My present business, I am working for the Modesto Irrigation District.

Q. In October of 1945 where were you living at that time? A. On Beckwith Road.

Q. What was your business at that time?

A. Service station.

Q. I want to call your attention particularly to this incident, the incident of a collision at the crossing of Beckwith Road with the Southern Pacific Railroad track on the 11th of October, 1945, an accident in which the Southern Pacific locomotive and an automobile in which were riding certain members of the Souza family, came into collision; did you see that accident? A. Yes.

Q. You were in the service station business at that time? A. Yes. [285]

Q. I want to call your attention to this diagram.

(Testimony of Claire L. Brown.)

This upper diagram, Mr. Brown, this double line that goes right and left across the diagram, and with the red line between is intended to represent the railroad track. It is the same on the lower diagram, but it is a different scale, a larger scale. Then these other lines toward the top of the diagram or the railroad track are intended to represent Highway 99. The two lines and the island in between are there. These lines along here marked "Beckwith Road" are intended to represent a fence and then Beckwith Road itself, the crossing with the railroad track and the intersection with Highway 99. Then beyond that there are a number of devices which are intended to represent buildings. Does that diagram show the gas station?

A. Well, the gas station should be here. I don't know what that is supposed to represent. Almost directly in front here. It should be right there (indicating).

Q. I will put a mark there where you pointed and draw a line out to the side and put a B on that line. I think you may just sit down in the chair again, Mr. Brown.

This is a picture that is introduced here and marked Defendant's Exhibit D. Can you locate in that photograph the gas station? I wonder if you would be good enough to hold that up to point out to the jury where in that picture the gas station is shown.

The Court: Have you identified the exhibit?

Mr. Dunne: Defendant's Exhibit D, your Honor.

(Testimony of Claire L. Brown.)

The Court: All right.

The Witness: A. Here (indicating).

Mr. Dunne: Just to the lefthand side of the picture, a white building?

A. Yes, a white structure.

Q. Mr. Brown, just before this accident happened, where were you?

A. At the time the accident happened, or just before it happened, I was servicing a car in the driveway in the station.

Q. Do you recall whose car that was?

A. It belonged to Tom Stetson.

Q. Where was the car and what were you doing, giving it gas and oil?

A. I had just finished putting in water and walked up to the side of his car. He had stepped out and told me to put gas in and I was moving toward the back of the car. I put the gas in.

Q. Will you tell the jury in your own way what you know about the accident, what you saw and what you heard, not anything that anybody has told you, but your own observation.

Mr. Myers: Pardon me, Your Honor, may I ask the witness to speak up a little more?

The Court: Yes, speak a little louder.

A. Well, as I recall, he got out of the car and told me to put gas in and just as he told me that I had noticed an engine, that [287] is, heard one—

Mr. Myers: Pardon me just a minute. Did he notice it or hear one?

The Court: Speak up.

(Testimony of Claire L. Brown.)

The Witness: I heard the engine, the noise of the engine, and as I recall—I don't recall whether Mr. Stetson said something to me, or just what it was, the engine started tooting, anyway, just as I looked up they struck the car, this car that was coming towards me. That's about all. Mr. Stetson went on over there then and I went in and locked my cash register. That is all I remember.

Mr. Dunne: Q. Now, Mr. Brown, see if you can make that a little more precise for the members of the jury. Can you tell us where down the track, how far off the locomotive was at the time you first saw it? I want to call your attention to something. On the lower of these diagrams the gas station does not show. It has not been marked in. Twenty feet, one inch on this lower diagram is intended to represent 20 feet down on the ground. To indicate what that is, there has been marked off here from the end of the fence down to the Valley Brew sign and that is a distance of 460 feet. Other measurements have been marked on here. The upper diagram is on a different scale. In the upper diagram one inch is equivalent to 100 feet on the ground. I want you to indicate to the jury as best you can where the locomotive was when you first saw it, either by telling [288] them or relating it to some object on the ground by estimate or distance, or if you can, by marking it. Anyway you want to indicate to the jury where the locomotive was.

A. Well, possibly—possibly between 50 and 100 feet, as near as I can recall.

(Testimony of Claire L. Brown.)

Mr. Myers: I am sorry, your Honor, I just can't hear the witness.

Mr. Dunne: "Possibly 50 to 100 feet, as near as I can recall."

Q. Where, Mr. Brown, was the automobile when you first saw it?

A. Just approaching the track. I wouldn't know how far it was because I was looking around the pump to see.

Q. One other thing. Did you see the car long enough, the automobile, I mean, long enough to form an estimate of its speed? A. I did not.

Q. Did you form any estimate of the speed of the locomotive?

A. I believe at the time I did think it was possibly going around 40 miles an hour, the locomotive.

Q. That was an estimate that you made at the time? A. That was it.

Q. What kind of weather was it that morning, Mr. Brown? A. As I recall, it was clear.

Mr. Dunne: I have no further questions. [289]

Cross-Examination

Mr. Myers: Q. Mr. Brown, you are now employed, you say, by the Irrigation District in Modesto? A. Yes.

Q. Is all of this territory that is shown here in the region of Beckwith Road on both sides of the right-of-way land that comes within that Irrigation District?

A. Well, no. Well, yes, it comes into the District.

(Testimony of Claire L. Brown.)

It doesn't come in my territory but it is in the District.

Q. It is all land where they raise alfalfa and have dairy ranches and that sort of thing where they irrigate a number of times a year?

A. Yes.

Q. And where they raise four or five crops of alfalfa and that sort of thing a year?

A. Yes.

Q. Is that right? A. Yes.

Q. When did you go to work for the Irrigation Company? A. The first of July.

Q. Of this last year? A. Yes.

Q. Now, Mr. Brown, coming back to this accident that happened on October 11, 1945; at that time you were operating this service station you have described, is that correct? [290]

A. Yes.

Q. Let me ask you: Isn't it true that you were servicing or about to service a car of a customer that had driven into the service station when the accident happened? A. Yes.

Q. And you had turned and were facing south down Highway 99 when you heard the engine whistle and in the middle of one of the whistles you heard the crash and then you went on; isn't that true? A. No.

Q. What is that?

A. I turned—I saw the crash just as it crashed, I saw it.

Q. How far was the automobile from the tracks, sir?

(Testimony of Claire L. Brown.)

A. It was right at the tracks, just as the crash struck it.

Q. It was on the track? A. Yes.

Q. So you don't know a distance 20 feet west of the track whether it had come to a stop or what had happened?

A. I don't know whether he stopped or not, no.

Q. Isn't it a fact, sir, that you did not see the engine involved in this accident until you heard the crash and then saw it proceeding in a northerly direction, north of Beckwith Road at a fast rate of speed?

A. Well, I think—I don't know. I saw the locomotive just before it struck the car. [291]

Q. Well, let me ask you this, Mr. Brown: Did anyone talk to you about the accident after the accident happened? A. Yes, sir.

Q. Who came to see you first about it?

A. I don't recall the man's name; he was a railroad investigator, I know.

Q. Mr. Aguer? A. That's right.

Q. He took a statement from you?

A. Yes.

Q. Was that on the day of the accident?

A. That was on the evening of the accident.

Q. Who was the next man who called to see you? Let me suggest this: Did a man by the name of Mr. Griek call to see you?

A. What was that name?

Q. Glenn Griek. A. Not that I recall.

Q. From the Hilton Agency in Modesto?

(Testimony of Claire L. Brown.)

A. Not that I recall. It is possible.

Q. You don't know, then, whether you talked to somebody else about the accident at your place of business or not?

A. Frankly, there was an accident later and I am confused whether it was someone talked to me on that accident or on this one, but there was in one or the other of those cases someone who talked to me. [292]

Q. After that did you talk to anyone about this accident until you came to San Francisco to testify?

A. No more than to just gossip, I suppose you would call it.

Q. I mean did you talk to anyone connected with the Southern Pacific Company about it?

A. Yes.

Q. When was that?

A. When did I talk to them?

Q. Yes.

A. I believe I talked to Mr. Dunne. I don't recall just when it was.

Q. Did you talk to Mr. Brady or any other gentleman from the Southern Pacific?

A. Mr. Brady was at my house one time, yes.

Q. As far as you know, has your version of this accident been the same all the time from the time Mr. Aguer first talked to you; is that right?

A. Yes.

Q. Mr. Brown, would you call these whistles that you heard in your own language sort of "spur-of-the-moment whistles"? A. Yes.

Q. Mr. Brown, I show you a document here of

(Testimony of Claire L. Brown.)

three pages and ask you if at the bottom of the first page, is that your signature?

A. It looks very much like it.

Q. I show you a word stricken out here and the initials "C. B." [293] Are those your initials?

A. Right.

Q. I show you page 2 and ask you if that is your signature? A. Yes.

Q. And is this your signature at the—

A. Yes.

Q. —top of the last page? That is your signature, sir?

A. Yes. You say the top of the last page?

Q. Well, toward the top. It is about one-third of the distance. Do you recall that this statement was taken from you on the first day of November, 1945, by a man by the name of Glenn Griek?

A. Well, it is possible. I don't remember the man at all. I do, as I say, in one of the cases I know there was a second man came to see me and took a statement some time later. I don't recall—

The Court: You remember giving the statement, signing it?

A. I remember I signed it. Apparently I signed it, yes.

Mr. Myers: I offer that in evidence, your Honor, as Plaintiff's exhibit next in order.

The Court: It will be received.

(Statement of Claire Brown was marked Plaintiff's Exhibit No. 12 in evidence.)

(Testimony of Claire L. Brown.)

Mr. Myers: If I may read the statement—I am through with the witness. [294]

The Court: If you are finished with the witness, you may read it. Any redirect?

Mr. Dunne: No redirect.

The Court: Step down. You may read the statement.

Mr. Myers: (Reading) “Modesto, California, November 1, 1945.

“I am Mr. C. L. Brown, owner of the Woodbridge service station at the intersection of the No. 99 Highway, and Beckwith Road. My service station is on the east side of the No. 99 Highway directly across from the Beckwith Road and the Southern Pacific Railroad crossing. I have been at my present location since May, 1945. Referring to an accident that took place on the 11th of October, 1945, about 9:15 a.m. at the Beckwith Road and the Southern Pacific Railroad crossing; the Southern Pacific Railroad runs north and south at this point between Modesto, and Salida, Calif.; Beckwith Road at this point runs approximately east and west, terminating at the No. 99 Highway which runs parallel to the Southern Pacific Railroad, about 30 feet east of the railroad tracks; between a lone engine, and a grey Ford coupe, I state. I was working at the gasoline pumps in front of my service station on the above mentioned date, and at the above mentioned time, taking an order from a customer who had just driven in to my station. I wasn't looking at the railroad tracks, but was facing about south. I hear a [295] train

(Testimony of Claire L. Brown.)

whistle two or three short little toots. These toots were not the regular blasts that the passenger trains usually give, but were kind of a "spur of the moment" toots. Following the toots, to be almost simultaneous with the toots came a crash. There couldn't have been more than a few seconds between the toots and the crash. I turned around at the sound of the crash. I saw a large piece of what looked to be a turtle back of a car flying through the air. The engine, after the collision, went on down the tracks to the north. I immediately called the Highway Patrol and notified them of the accident. They said they would send an ambulance out to the scene immediately. After I had completed my call to the Highway Patrol I went back out to the front of my station and filled my customer's car with gasoline. By the time I had finished filling my customer's car, the engine had backed up to the scene of the accident. There is no way I could estimate the speed of the engine, as I wasn't looking at it long enough to make an estimate. The engine was going too fast to stop immediately, however. I then went over to the scene of the accident and noted three men lying on the ground on the north side of Beckwith Road. I stayed at the scene about five minutes. During the time I was at the scene I saw that one man was dead, and one was injured very badly. This one man was groaning badly. The other man was conscious, but looked rather [296] dazed. I then left the scene of the accident.

(Testimony of Claire L. Brown.)

“I have read the above statement of three pages, and I believe it to be true and correct to the best of my knowledge.

“(Signed) Clair L. Brown.” [296-a]

E. T. STETSON,

called as a witness on behalf of defendant; sworn.

The Clerk: Q. Will you state your name to the Court and jury? A. E. T. Stetson.

Direct Examination

Mr. Dunne: Q. Mr. Stetson, where do you live?

A. Out four miles north of Modesto.

Q. In October, 1945, were you living at the same place? A. Yes, I was.

Q. Mr. Stetson, what is your business and what was it in October of 1945?

A. I have been in the same business for seven years, a McNess Route.

Q. A McNess Route?

A. A McNess Route.

Q. Will you tell the members of the jury what a McNess Route is?

A. I am a dealer for the McNess Company, who supply the farmers with household supplies, veterinary supplies, brooms and brushes.

Q. What do you mean by a route? Do you have a supply of goods that you take around with you?

A. I have a supply of goods in my practice and I go from farm to farm and sell the farmer what he requires.

Q. In October, 1945, just in a general way what was the location [297] of your route?

(Testimony of E. T. Stetson.)

A. Well, I went from the town of Salida to the town of Keyes, and up and down 99, and I go from the Stanislaus River to the Tuolumne River. I cover about—well, I cover a radius from the house of 15 miles each way.

The Court: Q. Do you make that trip every day?

A. I make one route a month. I make a trip every day, but I cover—Route No. 1 I cover every 30 days.

Mr. Dunne: Q. Did you witness an accident, a collision, at the crossing of Beckwith Road and the Southern Pacific tracks on the 11th of October, 1945, a collision between a locomotive and an automobile, in which were riding some members of the Souza family? A. Yes, I did.

Q. Where were you at the time of that accident?

A. I was across the east side of the highway getting gas to put in my car at the service station.

Q. Where had you come from?

A. I had come three and a half miles east from 99, where my home is. It is about three and a half miles east of 99 Highway straight across the country.

Q. Where did you hit 99?

A. It comes in on Dale Road, and then down 99 just below the service station.

Q. Mr. Stetson, this diagram up here, the top diagram, No. [298] 1, is drawn to a scale on which 1 inch on the diagram is intended to represent 100 feet on the ground. This line down along

(Testimony of E. T. Stetson.)

here is intended to represent Dale Road, this parallel lines. These lines along here are intended to represent the two sections of 99 with the island in between, and these buildings up in through here are intended to represent buildings that are about opposite the Beckwith Road crossing. As I understand, you had come then down Dale Road?

A. Over this road to Walnut Avenue.

Q. Into Dale Road?

A. Into Dale Road, and down Dale Road to 99, and up 99 to the service station which is directly across from Beckwith.

Q. Tell us after you drove into the service station what occurred there? What were you doing? Who was there, so the jury may know what was going on.

A. We were out of gas in the Model T Ford—that is not a truck, that is a sedan—and so my wife and I went over to get gas put into it, and so we drove over to Brownie's Service Station there to get gas. My wife went on into Woodbridge's Store to buy some groceries, and I was having Brownie service my car, and I was standing there on the 99 side, facing 99, the pump, the gasoline pumps. Brownie was putting gasoline in the car. As I was standing there I noticed this engine coming up the track, because it was coming with a rattle. The wheel plunger, or whatever it is that runs the engine on the wheels there was [299] rattling, so I was kind of surprised. It wasn't pulling a train coming up there, and I looked closely at the engine, and as the engine got up to what I saw was the

(Testimony of E. T. Stetson.)

signboard there, there was a signboard on the side of the railroad track, there, when the engine got to about that sign, I heard the bell ringing, and the engine kept on coming. I would state about 30 miles an hour in my estimation of it, and I also looked down the Beckwith Road. I could see down the Beckwith Road from where I was standing, because I was looking directly at the Beckwith Road, and I seen a car coming. A car came up close to the railroad. It didn't seem to shut off its speed. It kept coming at about 25 miles an hour. I said to Brownie—

Mr. Myers: Just a moment, your Honor.

Mr. Dunne: It is part of the *res gestae*.

The Court: No, what he said to Brownie isn't proper. Strike that. Just say what you saw.

The Witness: I saw the car coming, and I remarked—

The Court: No, don't say what you remarked.

The Witness: I saw the car coming, and the car kept on coming right across the tracks, and at that time the engine had struck the car on the rear end, right by the back wheel, and, of course, I saw the door fly off across the highway from the opposite side, and it hit the cross arm, the post alongside the railroad with the cross arm on it. Then we rushed [300] over there and we started taking people out of the car. The engine had stopped up the track, about, I would say, 300 feet beyond Beckwith north. The engineer and the fireman came back, and we laid these people out on the ground, there.

(Testimony of E. T. Stetson.)

Mr. Dunne: Q. What was the weather that morning, Mr. Stetson?

A. Well, it couldn't have been anything but a clear day—

Mr. Myers: Just a minute, your Honor.

The Court: Strike that out. We do not go by what couldn't have been. They seem to have unusual weather around Modesto now, anyway, so you had better tell us what it was.

The Witness: At that time of the year it was a bright, clear day. There was no obstruction to my driving.

Mr. Dunne: Q. One other thing. Are you able to tell us anything about a whistle on the locomotive, whether it was or was not sounded, or do you know?

A. I couldn't say whether it was blowing or whether it wasn't. It could have been blowing or wasn't blowing. That didn't attract my attention, at all. The whistle, it could have been blown or might not have been.

The Court: Q. What attracted your attention?

A. The bell on the engine and the rattling of the wheels on the engine.

Q. You said something about the driver hesitated. Did you mean to say the driver hesitated, or did you first say he didn't seem [301] to—

A. He didn't seem to hesitate. He came at this 25 miles an hour speed, I would say, and kept right straight across the track.

The Court: All right.

(Testimony of E. T. Stetson.)

Mr. Dunne: I have no further questions.

The Court: Cross-examine.

Mr. Myers: Your Honor, this is going to take some time. It is 3:20. I was responsible for holding the jury pretty late at lunch time.

The Court: That is not your responsibility. I held the jury. Let us go on and finish. I can't see why this should take a long time. At any rate, I will take the responsibility. I will declare a recess later on. The jurors are informed I am the only one who looks at the clock, so far as the hours are concerned, and the recess, I control them and not counsel; in fact, I am offended if a lawyer looks at the clock and tells me what time it is, because I am supposed to be in charge of this Court and not him. We have just so much work to do. If you want a recess—

Mr. Myers: Yes, I want a recess.

The Court: That is a different proposition. Don't put it on another ground. Put it on your own ground.

Mr. Myers: Your Honor, if I try to take the blame for it I am still wrong.

The Court: All right. We will take a short recess.

(Recess.) [302]

The Court: Proceed.

Cross-Examination

Mr. Myers: Q. Mr. Stetson, you had driven your automobile into the service station to get

(Testimony of E. T. Stetson.)

some gasoline, you say, prior to the time that this accident happened; is that right?

A. That is correct.

Q. Was Mr. Brown the man waiting on you?

A. Yes.

Q. What direction was your automobile facing as you drove in?

A. I was facing north, parallel to 99, toward Salida.

Q. You were facing toward Salida?

A. Yes.

Q. It was a Model T Ford?

A. No, a sedan. Four-door sedan, 1937.

Q. The gas tank was on the back end of it?

A. Yes. It comes up through the fender.

Q. What?

A. The spout comes up through the back fender.

Q. So that when Mr. Brown was putting some gasoline in your automobile there was no occasion for you to get out of the car, was there?

A. No, but I always did step out of the car because I am so used to stepping out of the front when I stop. I generally step out of a car as well. I am just familiar with that practice.

Q. What I meant was this gas tank wasn't under the driver's [303] seat so you had to get out.

A. No.

Q. When you stepped out of your automobile were you looking at Mr. Brown or which direction were you looking?

A. I was looking down 99. I was looking south on 99.

(Testimony of E. T. Stetson.)

Q. Same direction Mr. Brown was facing?

A. No.

Q. What?

A. Brown was working on my car. We will say the gas pump, two gas pumps are here, my car was in here on the inside lane of gas pumps and I was standing here, facing down south on 99.

Q. Facing back—in other words, that way (indicating). A. Facing that way on 99.

Q. And Mr. Brown was facing in what direction? A. He was filling the gas tank.

Q. On what side, the side you were on?

A. No. He was inside the pumps, filling the gas tank from the south pump.

Q. Your attention was first attracted by what?

A. By the rattle of wheels on the train, the engine.

Q. You mean the rattle of the wheels on the engine? A. Yes.

Q. When you heard that rattling of the wheels, what did you do?

A. I looked toward the engine.

Q. When you looked toward the engine, whereabouts was it? [304]

A. Well, the only landmark I know of there I remember distinctly was that signboard which sets on the west side of the track; it was below that.

Q. You mean this Valley Brew signboard?

A. Yes, that is the one.

Q. That, I believe the engineer said, was 460

(Testimony of E. T. Stetson.)

feet from the Beckwith Road. I believe that is correct.

Mr. Dunne: From the end of the fence. I marked it there.

Mr. Myers: Yes, 460 feet. You say he was below that signboard?

A. Yes, below that signboard when I saw him.

Q. How far below that?

A. I couldn't say exactly. I could still see the signboard, the color yellow, or whatever color it is, I could see the signboard and I could see the engine coming.

Q. You were over here somewhere?

A. Right straight across Beckwith Road.

Q. That comes in through here in this lower diagram.

A. Yes.

Q. So you are over here some place?

A. I was right here (indicating).

Q. Below this scale here?

A. I was over in here because I looked right down Beckwith Road.

Q. Put an X there where you think you were.

A. I would say here.

Q. All right. We will label that, with your Honor's permission, as S-1, being the position of Mr. Stetson when he first heard the engine and saw it, that was below the Valley Brew signboard. About how far below it would you say it was?

A. Well, it is pretty hard to guess in feet. I would say it was a distance of a block, anyhow, below the signboard.

(Testimony of E. T. Stetson.)

Q. In other words, the engine was 250 feet further on, further south of the signboard?

A. About a block below the signboard.

Q. You say about a block; about 250 feet?

A. Yes.

Q. So we have 250 feet more and that is your engine which was westbound, or southbound, whether you are a railroad man or whether you are a layman; is that right?

A. Yes. It was coming from the south.

Q. When you saw the engine generally there in that locality, did you keep on looking at it?

A. Yes, because the rattling of the wheels called my attention to it and it was coming at a slow rate of speed to my notion. That is what drew my attention, the rattling.

Q. How long did you continue to watch that engine? A. Well, clear until it hit.

Q. You continued to watch the engine until it hit this car at the crossing? [306] A. Yes.

Q. You were watching the engine all the time, Mr. Stetson? A. Yes.

Q. Did you see the automobile before the accident happened?

A. Well, I would like to restate that. I looked at the engine, then I looked up Beckwith Road.

Q. In other words, you did not have your eyes on the engine all the time.

A. I did until it passed that Valley Brew sign.

Q. Is it fair to say the engine, then, was past, just west of the Valley Brew sign then when you took your eyes off it the first time?

(Testimony of E. T. Stetson.)

A. It was south of the Valley Brew sign and then it was north of the Valley Brew sign when I took my eyes off.

Q. How much north of the Valley Brew sign?

A. I would say 100 feet north.

Q. 100 feet. So if that represents 100 feet, about in here is where the engine was when you took your eyes off of it; is that right?

A. Yes; just for the moment.

Q. Just for the moment. In other words, you momentarily took your eyes off it. A. Yes.

Q. We will label that S-2 as the position of the engine when the witness looked away from it the first time. [307]

When you looked away from the engine when it was in that position, whereabouts did you look?

A. I looked down Beckwith Road and I seen a car coming.

Q. You saw a car coming where on Beckwith Road?

A. Well, it was down the road, I couldn't exactly state how many feet it was.

Q. Well, about how far would you say, your best estimate?

A. Well, it must have been two or three hundred feet, I would say. I don't know exactly.

Q. Two or three hundred feet from where, from where you stood?

A. From the railroad track.

Q. From the railroad track.

A. Yes, down Beckwith Road.

Q. So the car was somewhere in the position

(Testimony of E. T. Stetson.)

we will label S-3 when you first saw it; is that correct? A. Yes.

Q. And 300 feet from the railroad track. Then did you continue to watch the car?

A. Well, my eyes glanced from the engine to the car because I was afraid—the engine was making the crossing and I fear that crossing myself very much. I always stop there before I ever cross the track.

Q. What were you afraid of when you saw the automobile 300 feet west of the track at that time and the engine was back from the crossing approximately 360 feet—whatever it may have been? [308]

A. Well, it happened very quickly, as you know, and I said to Brownie—

Q. Never mind that. What was it?

A. Well, it came in to my mind, Is that car going to stop at the railroad crossing or is it going to run in front of the engine? That is what came into my mind.

Q. Was that because the engine was not making any noise and was drifting along there as a light engine at the time, is that the thing that caused the apprehension in your mind?

A. Well, no, because I am afraid of the crossing, most of the crossings. I cross that every month regular and I am afraid of the crossing there; any crossing, in fact.

Q. What?

A. Any crossing, I generally always watch them carefully.

Q. In any event, your mind was filled with ap-

(Testimony of E. T. Stetson.)

prehension when you saw the engine back there and you could see the car down here on Beckwith Road.

A. Yes.

Q. So feeling that way about it, you continued to watch the vehicle, or both of them; what was the situation?

A. Well, I watched both of them, I suppose pretty close until—

Q. You are looking now—we have you looking down here at the automobile on Beckwith Road 300 feet west of the railroad track.

Mr. Dunne: Counsel has repeatedly said 300 feet. The [309] witness' testimony was two or three hundred feet.

Mr. Myers: Well, all right. Then I will correct it. I certainly don't want to misquote the witness.

Q. What is it, Mr. Stetson? It was approximately 300 feet, was it?

A. It is pretty hard to judge being on the ground and standing there and looking down any road. To my knowledge, the distance it was, it was between two and three hundred feet.

Q. Between two and three hundred.

A. Yes.

Q. There were grape vines growing on the south side of Beckwith Road?

A. Yes, there is.

Q. How far back from the railroad track do those grape vines extend?

A. Well, to my recollection, it extends quite a way back from the road. There is another ranch there and it goes in the side of the road there.

(Testimony of E. T. Stetson.)

Q. Where was this automobile with reference to the westerly end of this grape vine?

A. I couldn't say.

Q. Where was it with reference to the easterly end of the grape vines?

A. I couldn't say because I never took that as a land site there. I never noticed the grape vines.

Q. All right. We will put you down around the care, down here, from this distance and incorporate this with S-3 and call that S-4 to show that the car was somewhere in that area at the time you first saw it. How long did you watch it?

A. Well, my eyes didn't stay continuously on it. In other words, I watched it come and I turned again to the engine. I seen them both.

Q. Is it your testimony that as you stood here that you watched both the engine and the car as it traveled up to the intersection?

A. No. I say I glanced at the engine because I heard the bell ringing past the sign there, I heard the bell ringing there and I thought in my mind he would hear the bell.

Q. You heard the bell ringing but you did not hear any whistle blowing?

A. I never heard a whistle blowing at all.

Q. Is it fair to say, in your opinion, no whistle was blown on the engine?

A. I wouldn't say there was because I don't know whether it blew or did not blow.

Q. Well, if a whistle had of blown you would have heard it, would you not?

A. No, not necessarily. The valley is so open

(Testimony of E. T. Stetson.)

there you don't always hear the whistle at the crossings.

Q. Is it your testimony you could hear a bell where you could [311] not hear a whistle?

A. No, you couldn't overhear a bell on a whistle but you could hear the bell and I remember the ping of the bell ringing after it passed the sign.

Q. You don't recall hearing the whistle at any time?

A. No.

Q. When you watched this automobile there proceeding up toward the crossing, where did your eyes leave it to look back at the engine, where was that?

A. I couldn't say exactly where it was.

Q. What is your estimate?

A. In the excitement I was watching both of them and thinking if that fellow didn't stop the engine would hit him.

Q. Is it your testimony that in your own mind there was excitement when the engine was approximately 360 feet back of that Beckwith Road and they were two or three hundred feet from the crossing?

A. No, I don't think there was any excitement at all.

Q. What did you mean when you said "in the excitement" that you were unable to—

A. I mean in my mind, I was looking at both articles, my excitement. What I meant by that was my mind getting excited if that fellow didn't stop at the crossing. I travel that road every month and I stop at the railroad crossing and I know—I

(Testimony of E. T. Stetson.)

drive a panel-body truck and I can't see only out of the door, [312] the glass.

Q. Mr. Stetson, isn't this the situation, that as to the distance the engine was from Beckwith Road and as to the distance the automobile was from the crossing when you saw him, it was all a matter of reconstruction as you reconstructed it after the accident happened.

A. No, it was not, because I seen them before it happened.

Q. Then we will come back to the automobile. You saw the automobile proceeding in an easterly direction on Beckwith Road? A. Yes.

Q. I want to know, sir, what point it had reached when you looked back to the engine again.

A. I couldn't say. I seen both of them and I didn't think the distance there would be—

Q. What is your estimate as to the relative position on Beckwith Road when your eyes left it and you looked back to the engine?

A. I couldn't say. Two moving objects there; I couldn't say the difference between the two of them.

Q. Well, which one was moving the fastest, the engine or the automobile?

A. The engine was moving faster.

Q. How much faster?

A. Well, about 10 miles faster.

Q. Ten miles faster. What is your estimate of the speed of the engine? [313]

Q. About ten miles faster, and what is your estimate of the speed of the engine?

(Testimony of E. T. Stetson.)

A. Well, I couldn't say exactly, but I think between 20 and 30 miles an hour.

Q. The engine was going between 20 and 30 miles an hour, and where was the engine when you formed that estimate?

A. Well, when I first seen it coming along by the signboard, when I formed the estimate how slow it was going, because that is what drew my attention, the slowness of the engine. I could hear the rattling of it.

Q. So it was the slowness of the engine over 460 feet plus 250 feet from Beckwith Road that caused you to watch it, is that right?

A. To look toward the engine, that is correct.

Q. That caused you to have some apprehension in your own mind that there was going to be an accident?

A. No, not when I looked at the engine. I didn't think anything of an accident until I saw the car down Beckwith and the engine keep on coming, and then I wondered if that fellow was going to stop at the railroad crossing, because I figured they were both moving toward that crossing.

Q. Did you watch the automobile driven by Mr. Souza all the time it proceeded up Beckwith Road to the crossing?

A. I can't say I didn't take my eyes off of it. I remember seeing them both coming right along. I seen the automobile [314] come up that quick, and the engine come up the track.

Q. Did you ever form any estimate as to the speed of the automobile?

(Testimony of E. T. Stetson.)

A. No, just went on in my mind about 25 miles an hour.

Q. That is what went on in your mind, about 25 miles an hour?

A. Because it wasn't coming very fast.

Q. So just once more, then, I will ask you when you saw this automobile on Beckwith Road going 25 miles an hour, and this engine back on the right-of-way going 20 to 30 miles an hour, and the engine was approximately 600 to 710 feet from the Beckwith Road, and the automobile was from two to three hundred feet from the crossing, your mind was filled with apprehension as to what was going to happen to this automobile and the engine, is that right?

A. Yes, because I seen wrecks before.

Q. You kept your eyes then focused on both of them, the engine with its bell ringing, until the moment of impact, is that right? Did you stay standing in the same spot at the end of your car all the time that this was going on?

A. I was standing directly opposite the car.

Q. Your car?

A. Right opposite the middle of the car, between the pumps. I came out between the pumps and I stood on the outside.

Q. Did you stand there all the time?

A. I was standing there smoking all the time.

Q. Standing there smoking by the gasoline pumps all the time, is that right?

A. When I got out of the car I talked to

(Testimony of E. T. Stetson.)

Brownie, told him how much gas I wanted, and then I lit a smoke, and I stood there, and the noise of this engine drew my attention to the tracks.

Q. What was the noise of the engine that you heard?

A. Well, if you ever heard an engine coming up the track, you will hear the wheels rattle or the arm—I don't know which makes that noise, but it is a rattling of the wheels, like.

Q. Kind of a side rod pound?

A. Yes, the plunger pounding like. An engine generally goes pretty slow when it makes that type of noise.

Q. Was this engine smoking?

A. No, it was not.

Q. Was it steaming?

A. Well, there was a slight gray steam coming from the stack.

Q. Isn't it a fact that this engine was what they call drifting, it wasn't making any noise at all? It was running very silently as it came down to the intersection?

A. No, it was making enough noise to draw my attention to it.

Q. There wasn't anything else, a whistle or bell, that drew it to your attention?

A. No, I heard the bell but I didn't hear the whistle.

Q. You heard no whistle?

A. No whistle, at all. It could have been blown. I don't know. [316]

(Testimony of E. T. Stetson.)

Q. How far after the impact did the engine go before it stopped?

A. Well, there was a canal bridge above the road. It was this side of the canal bridge. I don't know how many feet that is.

Q. It could have been a thousand feet?

A. I wouldn't say. I don't know. But there is a canal bridge up there, and the engine stopped, seemed to stop as quickly as possible, and it was up that way because the engineer—I remember the engine stopping up there before I got across the highway. You see, it is a double lane highway, and before I got clear across the second lane of the highway I seen the engineer and the fireman coming back towards the accident.

Q. They did not back their engine back to the scene of the accident?

A. No, they didn't. They stopped it up there.

Q. They left their engine sitting back up the track?

A. And both of them came down the track.

Q. And they never did back it to the scene of the accident?

A. Never backed it up.

Q. Are you positive of that?

A. I am absolutely positive of that, because I got a remembrance of that, a memory that the engine blew off its pop valve and the engineer said to the fireman—

Q. Now, just a minute. No conversations.

A. Well, he made a motion to the fireman to go and shut the pop valve off, or turn down the

(Testimony of E. T. Stetson.)

steam, whatever they do. I [317] heard it blow off. You know how it blows when them pop valves go off.

Q. Was there anyone else on this engine besides the fireman and the engineer?

A. I never seen anybody only the engineer and fireman.

Q. Just the engineer and fireman?

A. That is all I saw.

Q. In your best judgment that is all there were, the engineer and the fireman?

A. That is all I know of.

Q. That is all you saw around the scene of the accident?

A. That is all I saw there, the engineer and the fireman.

Q. How long did you remain at the scene of the accident?

A. Just a minute. You asked me a question. I seen a doctor there at the scene of the accident, because when I ran across there to help to take them out of the car, one fellow said, "Don't touch them. Leave them alone." And I said, "No, they will smother in there. We have to get them out of there," and with the help of the others we got them out on the ground there, and at that time there was a doctor—I remember he had a brown suit and a gray hat. He came up and started to look over the people that was in the accident, and he said—he pronounced what had happened to them. One was hurt internally, and one was dead,

(Testimony of E. T. Stetson.)

and the other one wasn't hurt internally. [318]

Q. How long did you remain at the scene of the accident?

A. Well, I went back across the road and the ambulance came. I was across the road at Brownie's Service Station when the ambulance came up there.

Q. Were you there when Mr. Woodbridge brought Mrs. Souza back to the scene of the accident?

A. Yes, I was there when he brought them back.

Q. And Mrs. Souza was there?

A. Well, there was a crowd around there and I didn't go back over again.

Q. You saw Mrs. Souza there, didn't you?

A. No, I didn't see Mrs. Souza there, but I heard her crying across the track, there. I was back at Brownie's Service Station. and Brownie said, "That must be the Souza family."

Q. Mr. Souza was still laying there, was he not?

A. Mr. Souza—yes, right where we laid him. We laid him right on the side of the highway there.

Q. The ambulance came to the scene of the accident and had gone before you ever left, is that right?

A. Before I left, yes, that is right.

Q. Now, Mr. Stetson, when did the engine leave?

A. Well, I don't remember that at all, when it left.

Q. You have no memory at all when the engine left?

(Testimony of E. T. Stetson.)

A. No, I don't remember when it went away from there, at all.

Q. When it left did it pull away from the scene of the accident [319] or did it pull away from down the right-of-way a thousand feet or so?

A. The last I remember it was still standing where he stopped it, down the tracks. I don't remember when it left, at all. I don't remember that.

Q. You do not remember ever seeing it?

A. Not leave, no.

Q. Did you ever discuss this case with anyone at all before coming here to testify today?

A. No, I tried to get out of being a witness and so I never gave my name in as a witness, because I know these cases take a lot of time and everything, and I am pretty busy in my business, and so I try to keep away from being a witness if other people can do it.

Q. Do you know how your name was obtained as a witness? A. No, I don't know.

Q. Who first contacted you?

A. Mr. Brady came over to my house about three weeks ago, and that was the first I knew anything about it, and I didn't know what he came for. He said he was from the S. P.

I said, "I don't ship by the S. P. I ship by the Valley Express. They broke too many bottles for me. I used to ship S. P., P.M.T."

Q. You got mad at them and quit shipping?

A. No, I didn't get mad at them, but I just changed over to [320] the Valley Express, because

(Testimony of E. T. Stetson.)

during the war they had less breakage. They had a lot of green help in the freight depot at Modesto and it seemed like we had a lot of breakage, and, of course, that throws our stock out of balance. When we order our stock we expect to get our stuff.

Q. You did not discuss this accident with anyone, the details, as to the whistle, the bell, or anything else, or as to what you had seen on this morning that the accident occurred, until Mr. Brady came to see you about three weeks ago, is that right?

A. Yes, sir, outside of saying to Brownie, talking over with him how that accident happened, or something of that sort. We might have said that was a terrible thing to have happened there, and so on.

Q. You might have talked with Mr. Brownie, but what I mean is, as far as the Southern Pacific Company is concerned, or anyone connected with this case, the only discussion you had was about three weeks ago, and that was the first time in over two years and a half from the time of the happening of the accident?

A. That is the idea.

Q. And at that time, then, you tried to think back and did think back and told Mr. Brady what you observed on the morning that this accident happened, is that right?

A. Yes, sir, that is right.

Mr. Myers: All right. That is all. [321]

Mr. Dunne: That is all. The defendant rests.

(Defendant rests.)

The Court: Any rebuttal?

The Witness: Do you want me, your Honor?

The Court: No, you may step down.

The Court: Any rebuttal?

Mr. Myers: I do not think so, your Honor, but will you give me about two minutes here?

Your Honor, the plaintiff rests.

(Plaintiff rests.)

The Court: Ladies and gentlemen of the jury, there are some matters which must be taken up by counsel and the court prior to the beginning of the argument. It is late in the afternoon. We won't begin the argument at the present time. However, we have discussed the matter, and in order to give counsel full opportunity to present the argument, and in order to give the court the opportunity to read the instructions, which, because of the fact that we are trying three cases together, must be more elaborate than usual, we have decided to call you back earlier so that the presentation of the arguments and the reading of the instructions will not be broken up. Of course, from the moment I begin the reading of the instructions you cannot separate any more, and then you begin your deliberations right after, and, of course, after you begin your deliberations you cannot separate, [322] and if you go to lunch you will be taken to lunch together and so on in that manner until you have brought in your verdict. I am simply explaining that to you so you will understand why I am bringing you out so early an hour, because if we bring you back at ten o'clock,

I am sure counsel will have concluded the argument, but it will not be possible for the court to conclude the reading of the instructions by the lunch hour, and then after the argument of counsel we take the usual recess, then by the time I have read the instructions, which will probably take a half hour, we are in the middle of the afternoon, and I do not want you to have your eyes on the clock and be worrying about your transportation. If I send you out at an early hour then the responsibility is yours. If I send you out at a late hour, the responsibility is mine, when it comes to the time that you take to deliberate. So in order to arrange those things we have decided upon nine o'clock as a time for convening tomorrow. I am going to ask if that hour will inconvenience any of you who have a long way to come. Is that hour satisfactory? Everybody seems to agree on that.

Before we separate, and because this is the conclusion of the taking of testimony, I want to make an observation for the benefit of those of you who are not conversant with the technique in the Federal courts. It is the custom in Federal courts for the judge to propound questions to witnesses [323] if in his opinion he believes that a certain matter should be brought out at the time. Many of the State judges do the same thing. Some judges do not. I was a State judge before I became a Federal judge, and my technique was the same. Wherever I believed that a certain question should be asked in order to bring something out, I did it. However, I want to warn you that while it is the right, as I shall instruct you more fully tomorrow, of a judge

of this court, unlike that of the judge of a State court, to comment on the facts, I do not choose to comment on the facts and shall not exercise that right in this case. I think I so stated to you when you were examined concerning your qualifications to act as jurors in the case. Nor are you to infer from the questions that I may have asked, or from any exchanges between counsel and the court, that I have any view as to any of the facts in this case, whether they relate to the location of the place, to the geography of the place, to the weather, or to anything else. You are not to infer that because I asked a question, or while I was discussing the matter with counsel I said I had some familiarity with the country, having lived there, that I intended to convey any idea as to the facts which took place on that particular morning. That relates to anything I may have said in talking to counsel and in regard to the questions. I did not ask very many questions of the witnesses. I did ask some. My object was to bring out in greater detail certain facts [324] not yet fully testified to by the particular witnesses. You are not to infer from the questions I asked that I have any opinion as to the facts to which the questions relate. If from those questions you have made the inference that I have an opinion as to the particular facts to which the questions related, it is your right to treat it as an opinion, but you are at liberty to disregard in arriving at your own conclusions as to the particular facts, or as to the other facts in the case, such opinion. I thought I would give you this instruction at the present time. At the conclusion of the testimony I shall instruct you

more fully as to my province and your province when you return tomorrow after counsel have concluded the arguments in the case.

You are about to withdraw from the courtroom. The court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial, or to form or express an opinion thereon until the cause is finally submitted to you. Remember the admonition I have heretofore given to you, not to form any definite conclusion as to any fact until the cause is submitted to you after the arguments of counsel.

Before we withdraw, is there any other statement as to any particular incident, or any discussion between counsel and the court that you feel I should refer to for the guidance of the jury, lest they may have misunderstood anything I may have said? I would be very glad to refer to anything in particular. [325] Frankly, I am not conscious that I participated very much in the questioning in this particular case, but because this is a new panel I want to make certain that they did not draw any inferences one way or the other from the slight participation I have had on the questioning in this particular case. Mr. Dnne?

Mr. Dunne: No, your Honor.

The Court: Mr. Myers?

Mr. Myers: No, your Honor.

The Court: All right, ladies and gentlemen, you may withdraw from the courtroom.

(Thereupon the jurors retired from the courtroom and in their absence the following occurred:)

The Court: Let the record show that the jury has withdrawn and that the present proceedings are had outside of their presence.

Mr. Dunne: If your Honor please, with respect to each claim or cause of action and what was originally before consolidation as to each case, we respectfully move the court to direct a verdict in favor of the defendant, the Southern Pacific Company. We make the motion separately and severally as to each case and each claim, first upon the ground that there was no substantial evidence, and on the further ground that there is no evidence sufficient to sustain a finding of any negligence on the part of the defendant, [326] Southern Pacific Company, in the only respects charged in the complaint, with respect to the operation and control of the locomotive in question; on the ground that there is no substantial evidence to show that there was anything improper in the operation of the locomotive, as to the actual controlling of its movement nor as to the giving of signals of its approach.

Secondly, as to a second ground, now directed only at the claim made for injuries on behalf of John Martin Souza and of the claim made on account of the death of Antonio Azavedo Souza, first upon the ground that any negligence of the minor son is imputed to the father under the provisions of the California Motor Vehicle Code, Section 352, subdivision (b), and upon the ground that there is no evidence to support any finding except the finding that the minor son, John Martin Souza, the operator of the automobile, was guilty of negligence in trying to oper-

ate his automobile there, and attempting to cross the railroad tracks, and, more specifically, and in addition, that he was negligent in failing to look and to listen and to give heed to the approach of the locomotive and carelessly drove and operated his automobile in front of a locomotive that was approaching, plainly open to his view, and that he did so at a time when he was in a place of safety, where he could stop short of the track and have avoided the accident. He attempted to cross in front of a locomotive [327] approaching in plain view.

The Court: The motion will be denied.

(Thereupon the court and counsel discussed the instructions, the court indicating what instructions he intended to give.)

The Court: Before we withdraw, I want to make one observation for the record. I want to say now, while the jury is not present, the observation that I made concerning questions asked or discussion was prompted by a suggestion made by counsel for the plaintiff in the presence of counsel for the defendant in chambers, that not so much he, but his client felt that perhaps some observation I made about the weather, the unusual weather, or the word "unusual" that I put in a question asked might convey to the jury the impression that I was casting a doubt on the fact that a haze could occur. I used the phrase in the manner in which we use it generally in California, where every time you talk about the weather you declare it to be unusual, and I did

not intend to give my own impression of what the weather was, because Stanislaus County, along with most any county of the State, can have unusual weather. In fact, I have said that there is not a county in California where you could establish definite seasons without having exceptions to the matter, and it was not my intention at all to comment on the facts. I did not mean to indicate at all that I thought the testimony of the witnesses that it was hazy did not carry conviction. That fact was indicated by the fact that I referred to the tule fogs and the like, with the idea of having him give us all the information as to the nature of this atmospheric condition when the boy, himself, was on the stand. So I want the record to show that counsel called my attention to that, and my object in doing it at this time is to correct any such impression that may have arisen in the case by reason of the questions I asked or the manner in which the questions were phrased.

Mr. Dunne: As long as your Honor is stating that for the record, I think it should be completed by adding to it that your Honor then informed both counsel in chambers what you would do, and both counsel expressly or impliedly indicated that that was satisfactory.

The Court: All right. The record also shows that while I made no reference to the incident, that counsel were given an opportunity to have me amplify the remark and make more pointed references if they so desired.

Mr. Myers: That is right.

The Court: Sometimes, by referring to a matter like this you asseverate it and you admitted that in chambers, that you, yourself, did not know whether it was necessary, and I volunteered to say that I would of my own accord, make references to the matter in a general manner so that there would be no misapprehension on the part of the jury, that no observation [329] that I may make or any question I may ask is to be taken as indicating any opinion as to any of the facts in the case. All right.

(Thereupon an adjournment was taken until tomorrow, Friday, July 23, 1948, at nine o'clock a. m.) [329-a]

Friday, July 23, 1948, 9:00 o'clock a. m.

(Counsel for the respective parties made their closing statements to the jury, after which, and at 1:30 p. m., the court instructed the jury as follows:)

CHARGE TO THE JURY

The Court: Ladies and gentlemen of the jury, the court will now instruct you as to the law which is applicable to the case. As you have already been informed, all the instructions are written and will be read to you as written, with such changes as may suggest themselves as I read the instructions. Sometimes as I read an instruction I catch repetition, and I try to avoid repeating the same thing, and I stop and eliminate the part I think is repetitious. The only instructions which will be oral will be those given to you toward the

end of the charge, dealing with your conduct in the jury room, and the forms of verdict. If during your deliberations you desire a copy of the instructions they will be sent out to you if you make that desire known to the bailiff at the door. That also applies to all the exhibits in the case, both exhibits introduced by plaintiffs and the defendant, and the exhibit on the board, which is the Court's Exhibit. However, that exhibit, although designated as the Court's Exhibit, is an exhibit in the case. I merely introduced it because counsel agreed that it would be helpful and neither [330] had started the case, and I think Mr. Dunne put it on while he was giving the oral argument, and so I adopted it as the Court's Exhibit, but it is an exhibit in the case, no matter who claim paternity for it, and all of those will be sent to you as soon as you make your desire known, and if you desire this chart I think I will order it rolled in on the board so there will be no change of position, and you will have it before you and examine it in the jury room just as you face it in the courtroom.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied

as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given to you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to [331] base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do.

You are the sole judges of the effect and value of the evidence. Your power, however, of judging of this effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion, and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your mind. In other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.

In weighing the evidence you are to consider the credibility of witnesses who have testified in the

case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character, as shown by the evidence, their manner on the stand, their relations to the parties, if any, their degree of intelligence, and the reasonableness or unreasonableness of their statements, [332] and the strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testified, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty, or integrity, or by his motives, or by contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who has willfully sworn falsely as to a material point; and being convinced that a witness has stated what is untrue, not as the result of mistake or inadvertence, but willfully and with a design to deceive, you must treat all his testimony with distrust and suspicion, and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has, in other particulars, sworn to the truth.

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or comport with some fact or facts otherwise known or established by the evidence. You should not consider as evidence any statement of counsel made during the

trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts. [333]

Such statements, arguments, comments or suggestions are not evidence and must not be considered as such by you. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inference which you may deduce therefrom as stated in these instructions, and upon the law as given you in these instructions.

In a civil case, such as this, the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of evidence. The law does not require a demonstration, that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. The burden is upon the plaintiff to prove his case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight of the credible evidence as you find it to be. Or such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

If evidence for the defendant has been given by its employees, if you find that the testimony of such an employee [334] is not inherently improb-

able, is uncontradicted, and the employee and his testimony are unimpeached, then you are not at liberty to disregard that testimony solely upon the ground that it is given by one of defendant's employees. Nor are you to discredit the testimony of an employee solely because you may discredit, if you do discredit, the testimony of some other witness.

Or, differently put, the standards of credibility just given you in these instructions apply equally to all witnesses, including the employees of the defendant.

By this action the plaintiffs seek to recover damages from the defendant for death and injuries alleged to have resulted from the negligence of the defendant acting through its agents and employees.

The defendant has denied any negligence on its part, or on the part of any of its agents and employees. In addition it has pleaded negligence on the part of plaintiffs or others acting for them which proximately caused and contributed to the injury. It has also pleaded that the injury resulted from the negligence of the plaintiffs which was the sole cause, and sole proximate cause of the accident and injury.

You are instructed that there are before you three distinct actions, each of which must be determined by you on its own merits, and in accordance with the instructions hereafter [335] given to you.

For the convenience and purposes of trial, the three cases have been consolidated by stipulation of counsel for the respective parties.

The case of Josephine Souza against the Southern Pacific Company, et al., is an action brought by the plaintiff herself individually, and as guardian ad litem of her minor children, John Martin Souza, Lucille Josephine Souza, James Lawrence Souza and Benjamin Souza, and Mary Adele Souza, an adult child, all children being the natural issue of the plaintiff Joseph Souza, and her deceased husband, Antonio Azevedo Souza, for whose death the said parties prosecute this action.

Another of the consolidated cases is that of Geraldine Souza, Lawrence Souza and Richard Souza, minors, by and through their guardian ad litem, H. G. Eastman, against the Southern Pacific Company, and in this action, Geraldine Souza is the surviving widow, and Lawrence Souza and Richard Souza are the surviving minor children of Edward Anthony Souza, deceased, and Geraldine Souza, and Geraldine Souza being herself a minor of the age of twenty (20) years at the time of bringing this action has sued through her guardian ad litem and the guardian ad litem of the minor children, H. G. Eastman. They are prosecuting this action for the death of Edward Anthony Souza.

The third action is one brought by John Martin Souza, [336] a minor, by and through his guardian ad litem, Josephine Souza vs. Southern Pacific Company, for personal injuries alleged to have been sustained by him from the happening of the accident in question, and said John Martin Souza at the time of bringing this action was a minor of the age of nineteen (19) years.

Although in this action there are three separate sets of plaintiffs, the case of each set of plain-

tiffs is separate from and independent of that of the others. The law permits them to join as plaintiffs solely because their claims involve the same accident; however, their rights, if any, are separate, not joint. The instructions given you apply to each plaintiff unless otherwise stated, and you will determine each plaintiff's case separately, to the same effect as if you were trying three separate actions.

It is admitted by the pleadings that the accident with which we are concerned was a collision between an automobile driven by John Martin Souza and a Southern Pacific Company railroad locomotive at a point in Stanislaus County in this State where Beckwith Road intersects the railroad track. It is also admitted that the accident happened in the daylight hours and the answer admits that the accident happened at 9:02 a. m. on the morning of October 11, 1945.

The mere fact that an accident happened, considered alone, does not support any inference that some party, or any party, [337] to this action, more particularly the defendant was negligent.

The defendant railroad and its employees in engaging in the railroading business and in operating a railroad were engaged in a legitimate and lawful business, and in considering the claims made by plaintiffs in suit here, you will bear in mind that the defendant railroad and its employees are entitled to the same consideration at your hands as any individual or corporation engaged in any other form of business.

Everyone is responsible for the injuries occa-

sioned to another by his or their want of ordinary care or skill in the management of his or their property or person, except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.

An act of an employee within the scope of his authority as an employee, or within the course of his employment as an employee, is an act of his employer, and the negligence of the employee in the performance of his duties, is the negligence of the employer.

If you find from a preponderance of the evidence in this case that the defendants carelessly or negligently operated the locomotive at the time and place in question and as sole proximate result thereof plaintiff John Martin Souza was injured and Antonio Azevedo Souza and Edward Anthony Souza were killed without fault on their parts, your [338] verdict will be in favor of the plaintiffs for such damages as they may have sustained.

The gist of plaintiff's action being negligence, he must prove it. The defendant, Southern Pacific Company, is not liable simply because there was an accident and injury, if that was without fault on its part. Liability can be imputed to Southern Pacific Company only if the plaintiff proves two things by a preponderance of the evidence—first that there was negligence in the particulars charged in the complaint, and, second, that such negligence, if any there was, was a proximate cause of the accident. A defendant does not have the burden of proving freedom from negligence—to the contrary, the burden of proving negligence is on the party who charges it, in this case, the plaintiff.

The rights and obligations of the operator of a train and of the driver of a motor vehicle, both using a public street, are reciprocal; each owes to the other the exercise of ordinary care to avoid an accident.

When a railway company has a right to run its trains over and upon a public crossing, such as the one here involved, in running its trains thereon, where the public also has a right to travel, the railway company must exercise such care and precaution for the purpose of avoiding accident, injuring property or persons, as reasonable prudence would suggest, and [339] as are in its power to employ.

I instruct you that as a matter of law the rules with reference to the rights and duties of parties in the accident here complained of and in this lawsuit are not, in all respects, those which would apply in the case of a person approaching or crossing the tracks of a street railroad, laid on a street in a city, but, to the contrary, are in some respects distinct, and are rules which the law has worked out as particularly applicable to steam railroads. These rules which are specifically applicable to steam railroads will be given to you in these instructions, but I now call to your attention the fact that they are in some respects different from the rules for street railroads, and this is true, both as to the rights and duties of persons approaching or crossing the tracks and as to the rights and duties of the operators of the train. [340]

The law required of the Southern Pacific Company in the exercise of ordinary care to give the

signals required by law in the operation of its train to avoid injury to persons lawfully crossing the tracks. Whether ordinary care has been exercised in a particular situation is to be determined by you from all of the circumstances of the particular case. The care must be commensurate with the probable danger to be avoided. The greater the danger, the greater the amount of care which must be used. In other words, the amount of care to be exercised must correspond to the degree of apparent danger to be avoided.

There is no statute of this state, nor any ordinance or other rule of any governmental body, fixing or restricting the speed at which a steam railroad, such as Southern Pacific Company, may operate its locomotives on its tracks along its right-of-way, and over the public highway, at the point at which the accident complained of happened.

However, a railroad company must regulate the speed of its trains over public highway crossings with proper regard for the safety of human life and property. The character of a crossing affects the duty of the railroad company toward travelers on the public highway and its trains must pass over dangerous crossings at a less rate of speed proportionate to the danger. The question whether or not a rate of speed is excessive is one of fact for the jury to determine with relation to the particular circumstances of each case. [341]

You are instructed that the law of the state of California, among other things, provides:

A bell must be placed on each locomotive engine

and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road or highway; or a steam whistle, air siren, or air whistle must be attached and be sounded, except in cities, at a like distance, and be kept sounding at intervals until it has crossed the same.

You are instructed that the following rules and regulations of the Transportation Department of the Southern Pacific Company were in full force and effect at the time of the happening of this accident:

Rule 14: A whistle of two long, one short and one long blast will be sounded when approaching public crossings at grade, tunnels and obscure curves; to be commenced sufficiently in advance to afford ample warning but no less than $\frac{1}{4}$ mile before reaching a crossing, and prolonged or repeated until engine has passed over the crossing.

Rule 30: The engine bell must be rung when an engine is about to be moved; while passing through tunnel; while approaching public crossings at grade, beginning sufficiently in advance to afford ample warning, but not less than $\frac{1}{4}$ mile before reaching such crossing; and continuing until the engine has passed over the crossing; and [342] otherwise when necessary as a warning signal.

Rule 31: The whistle must be sounded at all places where required by rule or law or to prevent accident.

However, the court instructs you that these rules bear merely on the fact that the railroad company

recognized its obligation to give warnings by bells or whistles at certain places by instructing its employees on the subject and prescribing the manner in which such signals should be given.

But ultimately the question before you is not whether the whistle was blown or the bell rung in the manner prescribed but whether they were blown or rung at all.

And even then the fact is not important unless you find that the failure to do either was the proximate cause of the accident.

In this regard, I further instruct you that, in order to comply with this statute, it is not necessary for the railroad company to both ring a bell and blow a whistle, but, on the contrary, the doing of either one or the other, in compliance with the statute, is sufficient, so that if the bell has been rung, as provided in the statute, the whistle need not be blown, and, conversely, if the whistle has been blown as provided in the statute, the bell need not be rung. If the whistle is used, it need not be sounded continually, but it is only required that it be sounded at intervals. Of course the railroad may, if it so desires, go beyond the terms of the statute, and cause both the bell to be rung and the whistle blown.

Under the statute which deals with sounding of whistle or bell by a steam locomotive, it is the sounding or giving of the warning and not the hearing of it which determines the question of statutory violation. On this phase of the case, the only issue is whether a signal, as required by the statute, was sounded. If a signal was sounded

in the manner required by the statute, the fact that it may not have been heard by some person, is not ground for finding that the statute was violated.

You are instructed that if you shall find from the evidence that the train sounded the necessary signals required by law as herein defined, then the law has been complied with and your verdict should be for the defendant.

You are instructed that it is as much negligence to fail to see that which can be seen by the exercise of ordinary care, as it is negligence not to look at all.

Negligence is the omission to do something which a reasonable person, guided by those considerations which ordinarily influence a person of reasonable prudence, would do under all the circumstances of the situation in question, or the doing of something which a person of ordinarily reasonable prudence would not do under all the circumstances of the situation in question. The question whether or not there was negligence in a particular instance should be determined by you from all the circumstances and conditions as shown in the evidence at the time surrounding [344] the person against whom the negligence is charged. Ordinary care as used in these instructions is that degree of care that an ordinarily prudent person exercises under the same or similar circumstances and is never absolute, but relates to circumstances, time and place, and a failure to use such care is negligence.

Negligence is a comparative and not a positive term. It always relates to some circumstances of

time, place or person. It is determined in all cases by reference to the situation and knowledge of the parties and to all the attendant circumstances.

You cannot compare the negligence of defendant with the negligence of plaintiff, and attempt to determine which was guilty of the greater negligence. There can be no recovery against defendant by plaintiffs if plaintiffs were guilty of negligence no matter how slight, and such negligence contributed proximately and concurrently to the accident.

In considering the question of contributory negligence of the plaintiffs, I instruct you that the burden is on the defendant to establish by a preponderance of the evidence that the plaintiffs or any of them were guilty of contributory negligence, which proximately contributed to the injuries, and if the evidence on that issue is, in your judgment, evenly balanced, or if it preponderates against such contributory negligence, then it is not proved and you should find that the plaintiff is [345] not guilty of contributory negligence.

Contributory negligence is a want of ordinary care on the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. If you find that at the time of the accident, plaintiff was guilty of contributory negligence, no matter how slight, which contributed proximately to the accident, then

plaintiff cannot recover against defendant, even though you find defendant was also negligent.

In order to find a verdict for the plaintiffs, you must not only find from a preponderance of the evidence that the defendant was negligent but also that such negligence was the proximate cause of the injuries to plaintiff, and you must further find that the evidence fails to show by a preponderance thereof that plaintiff was guilty of negligence, however slight, which contributed proximately thereto; otherwise, your verdict must be for the defendant.

Contributory negligence is an affirmative defense, and the burden of proving contributory negligence, as I have already stated, rests on the defendant. But in considering this rule, you will bear in mind that, in determining the question of contributory negligence, you must consider the evidence which has been introduced on the plaintiffs' case, as well as the evidence introduced by defendant. If the evidence introduced on the [346] plaintiffs' case itself shows contributory negligence, a defendant may rely on that evidence without itself introducing any evidence. So, also, if the evidence introduced on the plaintiffs' case, in conjunction with the evidence introduced by the defense, shows contributory negligence, you must find in accordance with all the evidence, even though the evidence for the defense, if it stood alone, might not show contributory negligence. In considering the issue of contributory negligence, it is your duty to consider all the evidence which has been introduced.

It was the duty of defendant's employees in

charge of the operation of its train at the time and place here in question, to keep a lookout ahead for persons using the crossing, to give timely notice of the approach of the train by the ringing of its bell or the blowing of its whistle, as required by law, and to exercise ordinary care to prevent injury to persons using the crossing and themselves exercising ordinary care. Failure of defendant's employees to perform any of these duties would constitute negligence on the part of the defendant.

Even where there is no statute or ordinary on the subject, it is the rule in respect of the right-of-way at a railroad crossing that a vehicle or person approaching a steam railroad crossing, with the intention of going over the tracks, is under duty to yield the right-of-way at that crossing to any railroad train which may be approaching the crossing. It is not the [347] duty of the railroad train to stop and wait for the person or vehicle to cross, but, to the contrary, it is the duty of the traveler to stop and allow the train to pass if he cannot pass over ahead of it in safety.

A railroad track, the presence of which is known and which is known to be in use for the operation of railroad trains, is itself a warning of danger, without any other sign or signal, or warning. It is a warning to persons who have reached years of discretion and who are possessed of ordinary intelligence that it is not safe to cross it without the exercise of constant vigilance, in order to be made aware of the approach of a

train, and thus be enabled to avoid receiving injury.

Any person going toward and into a place where he knows there is danger of injury from moving railroad trains, is required to exercise greater vigilance and care than would be required of him in circumstances where danger from moving trains is not reasonably to be anticipated, and if he neglects to exercise any of the vigilance which the situation, in all the circumstances requires, he is guilty of negligence.

It was the duty of the driver of the automobile, John Martin Souza, to approach the railroad track at the crossing in such a manner and at such speed as to be able to control the movements of his automobile and to stop the same in the event it should appear to be dangerous to attempt to cross the tracks; and it was further his duty to look and listen before attempting [348] to cross the tracks and to give heed to the warning of a whistle or bell of an approaching locomotive if the same was being sounded audibly in order to ascertain if any locomotive was approaching the crossing and give heed to the locomotive itself if the same were open to his observation. And if, before going across the track, John Martin Souza, the driver of the automobile, by the use of ordinary care could have learned of the approach of the locomotive on the track in time to have avoided it by exercising ordinary care, but failed to do so, then he was guilty of negligence.

A passenger who goes in a vehicle of another, who does not exercise any control or have any legal right of control, over the conduct of the

driver, does not become responsible for the negligence of the driver, nor can the negligence of the driver be imputed to him in such case.

However, the driver and each of the passengers in the automobile was under a continuing duty to exercise reasonable care for his own safety at all times.

You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution, as required by law.

In determining whether the plaintiff John Martin Souza [349] exercised care sufficient to live up to the duty imposed on him and whether he was negligent, you are instructed that any want of care on his part, if so you find, is not excused by any assumption he might make that the operators of a locomotive which might be approaching would not be negligent, or that any locomotive which might be approaching would be operated in any particular way, whether as to speed or signals or otherwise. He was required to exercise reasonable care at all times, and to do so independently of the manner of the operation of the locomotive or the giving of signals, or warnings, or the failure to do so, if there were such failure. Any assumption which he might make as to the manner of operation of the railroad or any locomotive on the railroad could not excuse negligence on his part, if any there were. Even if no signals

were heard, and indeed, even if none was given, that would not excuse his negligence, if he was guilty of any.

It is the duty of those operating an engine and train to keep a reasonable lookout in front of the train and to use ordinary care to avoid striking or injuring persons or vehicles lawfully using the street whereon the train is being operated.

A railroad company has the right against one approaching the crossing to operate its engines and cars in the usual and ordinary way and to make such noises or movements as are usually and necessarily made by trains in motion under such circumstances, but it is its duty through its engineers, and other employees [350] to exercise reasonable and ordinary care and precaution in operating its trains and cars at crossings to avoid injury to a person who is himself using ordinary care and caution for his own safety thereat.

You are instructed that while the tracks of a railroad, such as that involved in this case, are in themselves a warning of danger, and while it is true that before one drives a vehicle into the space which would be occupied by a train if it were to pass over such tracks, it is his duty to use every reasonable opportunity to look and listen for the approach of train, engine or car on the tracks, you are instructed nevertheless that in determining whether or not the driver, in crossing over the tracks at the time of the accident in question, used every reasonable opportunity to look and listen for the approach of train, engine or car depends on all the surrounding circumstances, as

they would be met and viewed by a person of ordinary prudence, if he occupied the same position as the one whose conduct is in question.

A railroad locomotive which is in plain view operating along a railroad track and toward a highway crossing at grade is itself a warning of danger without any other sign or signal or warning and any person in an automobile approaching the crossing, whether driver or passenger, is under a duty to exercise reasonable care to observe and heed that warning, whether other warnings or signals are given or not. [351]

If you find that as the automobile approached the crossing where the accident happened, the view of the approaching locomotive was obstructed, still you cannot impute to defendant any responsibility for the existence of such obstructions to vision unless the plaintiffs have sustained the burden of proving by a preponderance of the evidence that such obstructions were on the railroad right-of-way, or subject to the defendants' control.

If you find that while the automobile was in a place of safety, approaching the crossing, the driver by looking could have learned of the approach of the train in time to have avoided the accident, by exercising ordinary care, and that in the exercise of ordinary care, he should have looked at such point, but did not, and looked for an approaching train or locomotive only when the automobile was so close to the track that if a locomotive were approaching, it could not be avoided by exercising reasonable care, he was guilty of negligence.

If, as the automobile approached the railroad tracks there was a place of safety in which the automobile could have been stopped before reaching the track and from which an observation of the track could have been made and that the exercise of reasonable care in the circumstances required that an observation of the track be made before an attempt was made to cross the track and that in the exercise [352] of such care to make the observation, the automobile should have been so stopped, and at such place, had the automobile been stopped, an observation could have been made of the approaching locomotive, and its approach could have been learned and that the driver negligently failed to stop the automobile and learn of the locomotive's approach before attempting to drive across the track, then he was guilty of negligence and if that negligence was a proximate cause of the accident here in question, the plaintiff cannot recover.

If the automobile drove from safety to a place of danger and was struck by the locomotive in such a short space of time that the injuries and deaths resulted before the fireman could have time to warn the engineer and the engineer could have time to apply the brakes, it is immaterial in this case whether the brakes were or were not applied and it is also immaterial when they were applied, if they were applied at all.

If as the railroad train was being operated along the tracks and toward the crossing, a motor vehicle was driven toward the track and train, and if, until the vehicle was first seen by the

train crew, there was negligence on their part, then, if, when they first saw it, it was so close to the train and was approaching the crossing in such manner that a collision seemed imminent, and the operators of the train were then suddenly, and without negligence on their part, confronted with a situation of imminent danger which [353] demanded immediate action, they were required, in such circumstances, to act only as reasonable men would act in such circumstances of sudden discovery of emergency and danger, and their conduct is not to be tested by what might have been done if there had been time for mature and considered deliberation.

If the driver of the automobile, John Martin Souza, was guilty of any negligence which was the sole proximate cause of the accident, injuries and death, it will be unnecessary for you to consider any other question in the case, and you will return your verdict in favor of defendant.

I now desire to call your attention to certain other provisions of the Vehicle Code of the State of California to be considered by you under the evidence and the instructions of the court.

Sec. 250 provides:

“It is a misdemeanor for any person to drive a motor vehicle upon a highway unless he then holds a valid operator’s or chauffeur’s license issued hereunder except such persons as are expressly exempted under this code.”

So far as we are concerned with it, the only exemption is that of a case of a minor over fourteen years of age who may apply for and receive

an instruction permit entitling him to drive a motor vehicle upon the highways, but this exemption applies only if he has such a permit in his immediate possession, the permit is good only for a period of ninety days after [354] it is issued, and it is good only when he is operating the motor vehicle when accompanied by, and under the immediate supervision of a licensed operator or chauffeur.

It is further provided by Sec. 265 of the Vehicle Code that application for an operator's license shall give certain information, including a statement whether the applicant has normal use of both hands and feet, understands traffic signs and signals and whether the applicant has ever been afflicted with certain specified diseases.

When the application is made, then, under Vehicle Code Sec. 267, the applicant shall be examined and the examination shall include a test of the applicant's knowledge and understanding of the provisions of the Vehicle Code governing the operation of vehicles upon the highways, his understanding of traffic signs and signals, and he shall be required to give an actual demonstration of his ability to exercise ordinary and reasonable control in operating a motor vehicle. The examination shall also include a test of his hearing and eyesight and such other matters as may be necessary to determine his mental and physical fitness to operate a motor vehicle upon the highways. The Vehicle Code, Sec. 269, specifies that license shall be refused to an applicant who is unable, as shown by examination, to understand

traffic signs and signals or who does not have a reasonable knowledge of the provisions of the Vehicle Code governing operations of vehicles upon the highways or [355] where it appears by examination or other evidence that the applicant is unable to operate a vehicle upon a highway safely because of physical or mental defect or lack of skill.

The fact that a person driving an automobile is unlicensed does not, in itself, constitute negligence. Nor is it *prima facie* proof of negligence.

But it is a fact which you have the right to consider in determining whether John Martin Souza was guilty of negligence which directly and proximately resulted in or contributed to, the accident. Differently put you may consider the fact that John Martin Souza did not possess a license if you find a casual connection between that fact and the accident complained of.

By Section 352(b) of the California Vehicle Code, in effect at the time of this accident, it is provided that any negligence of a minor whether licensed or not under that code in driving a motor vehicle upon a highway with the express or implied permission of his parents shall be imputed to such parents for all purposes of civil damages. Accordingly, if you find from a preponderance of the evidence that John Martin Souza, a minor, drove the automobile with the permission, express or implied, of his parents and that there was negligence on his part which was a proximate cause of the accident and of the death of his father, Antonio Azevedo Souza, such negligence

is to be imputed to the father with the same effect as though the father himself had been guilty of negligence. [356]

To summarize this portion of the instructions:

It is not enough that the plaintiff establish by a preponderance of the whole evidence in the case that the defendant was negligent. Plaintiff must go further, and prove by a preponderance of the evidence that the negligence, if any, on the part of the defendant contributed directly and proximately to the injuries to plaintiff, and it is immaterial whether or not the defendant was guilty of some negligence unless it was such negligence as caused or contributed directly and proximately to the injuries to the plaintiff.

The law therefore imposes on plaintiff the burden of proving two things by a preponderance of the whole evidence: that is (1) that the defendant was guilty of negligence, and (2) that such negligence of the defendant directly and proximately caused or contributed to the injuries of the plaintiff.

In cases of this sort it is customary for the complaint to allege an amount of damage claimed. There are such allegations here. These allegations are merely a claim. They are not in any sense evidence or proof and are not to be taken by you in any sense as evidence or proof of what damages should be awarded, if you award any damages. If you award any damages, the amount of damages you must resolve for yourselves in each case under the instructions which I have given

you and upon the evidence which has been introduced. [357]

If your verdict is for the plaintiffs, then in estimating their damages you may take into consideration the loss of support, if any, sustained by them on account of the deaths of the decedents; and in estimating the value of such loss you may determine the amount that the decedents would in all reasonable probability have earned in the years yet remaining to them, deducting therefrom the amount which they would reasonably require for their own personal use or maintenance; furthermore, you may consider the value to the wives and children of the comfort, society and protection, if any, of which they have been deprived; and from all of these elements you will resolve what sum will fairly compensate plaintiff for the pecuniary loss sustained by them, not however, in excess of the amount prayed for in the complaints.

No damages can be awarded in an action for death, for grief, sorrow and mental suffering of the heirs. This rule does not, however, preclude compensation to the heirs at law of a deceased person for pecuniary loss suffered on account of the deprivation of the society, comfort and protection of the deceased.

Under the law in effect at the time involved in this action, and so far as the same is applicable to the matters alleged, it is provided as follows:

“When the death of a person * * * is caused by the wrongful act or neglect of another, his heirs [358] may maintain an action for damages against the person causing the death.

Such law further provides that in such action 'such damages may be given as under all circumstances of the case may be just'."

Compensatory damages are not subject to proof. In other words, it is not necessary that any witnesses should have expressed an opinion as to the amount of such damages. You may make such estimate of damages from the facts, circumstances and evidence in the cause in the light of your knowledge and experience in the affairs of life.

However you must not allow for elements of damage which are speculative or conjectural.

Where an action is brought on account of the death of a person, such action is solely for the purpose of compensating for the pecuniary loss, if any, suffered by reason of the death. Accordingly, if you should return a verdict for any plaintiffs for damages for a death, your award must be restricted to such an amount as will reasonably compensate for any pecuniary loss suffered, and for that alone, and the burden of proving pecuniary loss is upon the plaintiffs. There can be no substantial recovery on behalf of a person who has not suffered substantial pecuniary loss. The action, as I have already stated, is not for the loss of an object of love and affection, and the law does not recognize the loss of [359] an object of love and affection as a ground for allowing damages, but restricts recovery to pecuniary and financial loss. Nothing can be allowed on account of any sentimental value which may have attached to the life which has been lost.

The pecuniary interest of a child in the loss of a father does not necessarily end at the arrival at the age of majority, but the jury may allow for the probable loss of benefit, if any, of a pecuniary value which the child would with reasonable certainty, receive from its parent either before or after arrival at majority.

In dealing with the question of prospective loss of contributions, you will remember that it is the prospective loss of contributions and not the earnings or earning power of the deceased which is the matter to be given consideration; and where the deceased would have applied for his own benefit part of his earnings, in determining the loss of contributions to the beneficiary, if any, such part of the earnings as the deceased would have applied or used for his own benefit must be deducted. The plaintiff has the burden of proving what, if any, part of the earnings of the deceased would have been contributed to the statutory beneficiary.

If damages are awarded, the only amount which you can award is such as reasonably to compensate for the detriment suffered. If damages are awarded, they must not, in any event, exceed [360] what is reasonable. They must not be enlarged so as to constitute either a gift or windfall to the plaintiffs or punishment or penalty to the defendant. The only purpose of damages is to award reasonable compensation. There is no purpose here to inflict punishment or impose any penalty or to make an award for the sake of example.

The following instruction applies only to John Martin Souza:

For the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

If the plaintiff, John Martin Souza, is entitled to recover, the measure of his recovery is what is denominated compensatory damages, that is, such sum as will compensate him for injury he has sustained. The elements entering into damage are the following:

Such sum as will compensate for the reasonable expenses paid or incurred in caring for and nursing him during the period that he was disabled by the injury, not exceeding amounts therefor shown by direct evidence and stipulation of counsel.

The value of his time during the period that he was disabled by the case, if the evidence shows that he was so disabled.

The value of any property of his which was damaged. [361]

Such reasonable sum as the jury shall award him on account of pain and anxiety he has suffered by reason of his injury, and is certain to suffer in the future.

The first three of these elements are the subjects of direct proof and are to be determined by the jury on the evidence they have before them.

The other elements are, from necessity, left to the sound discretion of the jury, to be exercised

in accordance with the instructions here given and under the facts proved in the record.

If you should return a verdict for the plaintiff in this case, then I instruct you that, as a matter of law, it will be improper for you to attempt to measure the damage occasioned by any injury which plaintiff may have received, by attempting to put yourselves in plaintiff's place or ask yourselves what sum you would take to make such an exchange of place. The plaintiff's injury has already been suffered, and you cannot measure the damages for it by attempting to say what you would take for such an injury. The only thing you are entitled to consider is what sum would reasonably compensate for any injury any plaintiff may have suffered.

You are not, in ascertaining the amount of damages, if any, to resort to the polling plan or scheme, which has sometimes been adopted by juries for such purposes, contrary to law. That plan or scheme is where each juror writes the [362] amount to which he considers the plaintiff entitled, and the amounts so written are added together, and the total divided by twelve. This is a quotient verdict and is a scheme of chance, not allowed by law, as no element of chance may enter into your verdict or into the determination of any question necessary thereto.

If you believe from the evidence, and from the instructions of the Court that defendant is not guilty of the negligence charged, then you have no right to compromise the question of defendant's liability and award the plaintiffs some amount

merely because someone was killed or injured on the occasion in question. If you believe that the defendant was not negligent as charged in the complaint, then you will have no occasion to consider at all the question of damages.

The fact that I have instructed you upon the measure of damages is not to be taken by you as an intimation that I believe the plaintiff or any of them is entitled to recover damages. These instructions are given you solely to aid you and guide you in finding a verdict in the case, in the event you find that the plaintiff, or any of them, is entitled to recover.

And I add, in conclusion, that if from the evidence and under the instructions as I have given them you, you do not believe the plaintiff, or any of them, is entitled to recover, the instructions given on the subject of damages lose their entire significance and need not be considered at all. [363]

Your first duty upon retiring to the jury room to begin your deliberations in this case will be to select one of you to act as the foreman in the case. As you were already informed, the jury in Federal cases in Federal courts is what is known as a common law jury. It requires unanimity, which, as the word implies, means that all twelve of you must agree before any verdict can be returned as to any of the plaintiffs in the consolidated actions.

For your assistance, the Clerk has prepared certain forms of verdict. The first form reads, omitting the court and cause, "We the jury find in favor of the plaintiffs and assess the damages against the defendant in the sum of (blank) dol-

lars; on behalf of the plaintiff, John Martin Souza, et cetera, in the sum of (blank) dollars; in behalf of the plaintiff, Geraldine Souza and others, in the sum of (blank) dollars; in behalf of the plaintiff Josephine Souza, et al., dated this blank day of July, 1948, Foreman.”

You must determine the verdict separately as to each of the plaintiffs involved. If you find in favor of the plaintiff John Martin Souza, then you will insert the amount of damages at the place indicated in front of his name. If you find in favor of the plaintiff Geraldine Souza, you will insert the amount you award as damages in the place indicated in front of her name. If you find in favor of the plaintiff Josephine Souza, you will insert the amount in the place indicated in [364] front of her name.

Because there are three forms of verdict, I have had the clerk prepare a general form and separate special forms. If you find in favor of defendant against all the plaintiffs, then you may use this form of verdict: “We the jury find in favor of the defendant. Dated this (blank) day of July, 1948, Foreman.”

If you find in favor of the defendant as against any of the three, less than all, then you can use the form of verdict containing the plaintiff’s name. There is one, for instance, which says, “We, the jury find in favor of the defendant and against the plaintiff John Martin Souza.” You will use that if you find against that plaintiff and in favor of the defendant, as to that case. Another one has the name of Geraldine Souza. You will use

that if you find in favor of the defendant and against Geraldine Souza. And if you find a verdict in favor of the defendant and against the plaintiff Josephine Souza, then you will use this particular form. Whichever your verdict is, the form must be dated and signed by your foreman and returned to this court.

Are there any objections to the instructions given or refused? If so, an opportunity will be given to present them outside the presence of the jury. We will either retire to chambers or we will let the jury retire to the jury room while we discuss any objections to any of the instructions. [365]

Mr. Myers: That is agreeable, your Honor.

The Court: What is agreeable?

Mr. Dunne: Whichever you stated is agreeable.

Mr. Myers: Shall we retire to your chambers?

The Court: I think we had better let the jurors retire. They will be freer in the jury room. This is off the record.

(Off the record statement of the court.)

The Court: May it be stipulated the usual admonition has been given?

Mr. Dunne: Yes, your Honor.

Mr. Myers: Yes, your Honor.

The Court: You may withdraw from the courtroom.

(Thereupon the jury retired from the courtroom, and in their absence the following objections were made:)

Mr. Myers: For the purpose of the record, your

Honor, may I object to the giving of Defense Instruction No. 58-F, which had to do with the operator's license, on the ground that it had nothing to do with the happening of the accident at all, and it covered a situation just in, you might say, a similar manner in which my proposed instruction was drawn on a provision of the Penal Code with reference to one failing to sound a whistle or a bell before going across a crossing; in other words, both of those things relate to persons violating the law being guilty of a misdemeanor. It did not seem to me, at least, that the absence of an operator's license had anything to do with the happening of this accident.

The Court: That is a question of fact. That is why I worded it the way I did, and I modified it by saying that the violation of any of those sections meant nothing unless they can find a casual connection between that and the accident.

(Discussion.)

The Court: We must not keep the jury out too late. It is 3:30 now.

Mr. Myers: I was under the impression the jury was out deliberating.

The Court: No, the jury is not out deliberating. The jury is not out deliberating until the bailiff is sworn, because you may convince me I am wrong. This is off the record.

(Off the record statement.)

Mr. Myers: It is my understanding at this time we are going to object to instructions.

The Court: That is right.

Mr. Myers: The other instruction, your Honor, that I objected to your Honor omitting was instruction No. 23.

The Court: I gave that in various forms, and I thought I was harping too much on that. I have no objection to giving it in the particular form, but I gave a long one that you suggested, No. 17, a very long instruction.

(Discussion.) [367]

Mr. Myers: Very well, your Honor. I have no further objections.

The Court: That was merely repetitious.

Mr. Dunne: I will state very briefly, for the purpose of the record my exceptions. I think I understand your Honor's position on these since we have discussed them many times. I respectfully object to the modification of Defendant's Proposed Instruction No. 37, which left to the jury the question of the consent of the father to the driver of the automobile as a matter of fact, instead of instructing that that is a matter of law. I understand your Honor's position.

The Court: I have already told you that to say that, I would have to instruct it was negligence per se.

Mr. Dunne: I appreciate your Honor's position.

(Discussion.)

Mr. Dunne: I respectfully except to the giving of Plaintiff's Proposed Instruction No. 9, in substance and in effect stating to the jury that the

plaintiffs were entitled to anticipate that the defendant would exercise care in the operation of its locomotive, and in connection with that I respectfully object and except to the denial of the Defense Proposed Instruction No. 27, which would have told the jury that the operators of the train were entitled to assume that any traveler traveling upon the highway would perform duties that the laws of the State impose upon him. [368]

The Court: I gave that. I merely cut out the last paragraph.

Mr. Dunne: Yes.

The Court: I do not like to take specific facts and apply each instruction to the specific facts in the case.

(Discussion.)

Mr. Dunne: We respectfully object and except to the failure to submit the question of joint enterprise to the jury as a question of fact, and the question of agency as a question of fact as between the two brothers.

The Court : I may state for the record I did not submit that because there was no evidence upon which a joint enterprise could be based, that the father and brother were going along merely to view a ranch, and there was no showing that they had any interest in the ranch, and they went there merely in an advisory capacity to give their own judgment in the matter.

Mr. Dunne: We respectfully object and except to the failure to give Defense Proposed Instruction No. 56, which would have told the jury that

if the circumstances were such that the plaintiff must have seen, the driver must have seen an approaching locomotive——

The Court: I marked that "Yes" and then I struck it out because I substituted for it a third instruction which I gave in another case, and which distinctly told the jury that [369] if a man had looked he would have seen.

(Discussion.)

Mr. Dunne: We object and except to the failure to give Defendant's proposed Instruction No. 56, which would have told them that if the approach of the locomotive could have been learned, he did not look or failed to and crossed in front of it.

The Court: I think that is covered.

Mr. Dunne: We respectfully object and except to the failure to give Defendant's Instruction No. 58-E, based upon Section 596 of the Vehicle Code of California. That is the crowding instruction. We have discussed that.

The Court: Tell the jury we will call them in. They have not begun their deliberations yet. The bailiff has not been sworn. Tell them we will call them very soon. They want some exhibits. Evidently they are getting anxious. Which one are you talking about?

Mr. Dunne: That one is 58-E. That is the instruction that has to do with crowding.

The Court: I decided that there was no violation of any law such as that contemplates. Nobody was sitting on anybody else's lap. There were

three persons, and there is supposed to be room for the three persons in the front seat of any car, that is, any standard car.

Mr. Dunne: We respectfully except and object to the failure to give Defense Proposed Instruction No. 58, which in substance and effect states that if the circumstances were such that the driver, by looking, must have seen the locomotive in time to have avoided it, any testimony that he looked and did not see may be disregarded by the jury.

The Court: I did not give that, because the other instruction was sufficient. I do not like to single out any bit of testimony for comment on one side or the other.

Mr. Dunne: We respectfully except and object to the failure to give Defense Proposed Instruction No. 58-A, which would have told the jury the mere fact two other persons were in the car did not relieve them or any of them from the duty of exercising ordinary care. Maybe your Honor has covered that.

The Court: I gave that in a different form:

(Discussion.)

The Court: Call back the jury now.

(The jury returned to the courtroom.)

The Court: Let the record show that the jury have returned to the box. Ladies and gentlemen of the jury, the instructions as given by the court are before you without modification, and now the bailiff will be sworn.

(The deputy Marshal was thereupon sworn.)

The Court: You will now follow the bailiff and begin your deliberations in the case. I hand to the bailiff the forms of verdict, and as soon as you notify us about the exhibits [371] we will send them down to you.

We will stand at recess until we hear from the jury. Here are the instructions given and the instructions refused (handing to clerk).

(Thereupon, at 4:50 p. m., the jury retired from the courtroom to consider its verdict.

(At 6:50 p. m., the jury having sent a note to the court, the court convened in the absence of the jury and the following occurred:)

The Court: Let the record show the clerk is present, and counsel are present. I have an inquiry from the jury. It is not signed by the foreman. It was handed to the bailiff. It reads like this: "Amount Mrs. Josephine Souza prayed for to cover funeral expenses of her husband.

"Amount Mrs. Geraldine Souza prayed for to cover funeral expenses of her husband.

"Amount J. M. Souza prayed for car replacement."

Mr. Myers: I guess they are in the record, but I can furnish them right here.

Mr. Dunne: Are your figures the same as those in the prayers?

Mr. Myers: We had better take it off the complaint.

The Court: My thought is, rather than bring them in, if we can agree on an answer to be given,

I will write an answer and make a record of the answer to be sent out. [372]

Mr. Dunne: Reading from the complaint, in the action in which Geraldine Souza is the plaintiff, the amount prayed for for funeral expenses is \$1047.38.

Mr. Myers: We can stipulate that that was the bill that was put in evidence.

Mr. Dunne: I accepted your statement.

The Court: I will write across these the amounts, and with the approval of counsel hand to them, as follows.

(Discussion between court and counsel off the record.)

The Court: All right, gentlemen, I am going to hand this back and then I will instruct the bailiff to tell the foreman to keep it and return it later on:

“The Court has numbered the inquiries and with the approval of counsel answers them as follows:

“1. Amount prayed by Mrs. Josephine Souza for funeral expenses of her husband is \$1157.38.

“2. Amount prayed by Mrs. Geraldine Souza for funeral expenses of her husband is \$1047.38.

“3. Amount prayed by J. M. Souza for car replacement is \$650.”

Now, gentlemen, if you will sign below, here, so that they will know that you approve that, I will send it out. Tell the foreman to sign the inquiry and then return it later in the courtroom when they come back for filing, and not to destroy it. [373]

(Thereupon the court recessed, and at 7:05 p. m. the jury returned to the courtroom, and in the presence of the court and counsel the following took place:)

The Court: Let the record show that the jury have returned to the courtroom. Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you hand the verdict to the court through the bailiff and the clerk? Mr. Clerk, will you read the verdict?

The Clerk: Ladies and gentlemen of the jury, harken to your verdict as it shall stand recorded:

“The jury find in favor of the plaintiffs and assesses the damages against the defendant in the sum of \$1150 on behalf of the plaintiff John Martin Souza; in the sum of \$31,047.38 on behalf of the plaintiff Geraldine Souza, et al., and in the sum of \$16,157.38 on behalf of the plaintiff Josephine Souza, et al.

“Dated this 23rd day of July, 1948.”

Signed “R. R. LOCKHART,
Foreman.”

So say you all?

The Court: Do you desire to have the jury polled?

Mr. Dunne: If you please, your Honor.

(Thereupon the jury was polled, each juror answering [374] that it was his or her verdict, after which the verdict was recorded and the jury excused.)

Mr. Dunne: May we have the usual stay of execution?

The Court: Yes, stay of execution until ten days after the disposition of the motion for a new trial.

Mr. Dunne: Yes, your Honor.

The Court: You gentlemen will consult me about the date to see that it is made at a time when I am still here or when I can be here.

CERTIFICATE OF REPORTER

We, Official Reporters and Official Reporters pro tem, Certify that the foregoing transcript of 375 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ JOSEPH J. SWEENEY,

/s/ KENNETH G. GAGAN.

[Endorsed]: Filed October 22, 1948.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF MOTION FOR NEW TRIAL

Monday, August 9, 1948

Appearances: For respective parties plaintiff: Hildebrand, Bills & McLeod, (By: Sheridan Downey, Jr.) For defendants Southern Pacific Co. and E. S. Glanville: Dunne & Dunne, (By: R. M. S. Boyd.)

The Clerk: Souza versus Southern Pacific Company.

Mr. Downey: This is a motion for a new trial.

The Court: Yes, I have read the papers in the case.

Mr. Downey: Mr. Dunne is out of town and taking a vacation and I have talked to Mr. Myers. We believe that we will be able to arrange on a suitable date to argue the matter either in Los Angeles or here probably early next month if that meets with your Honor's convenience; or perhaps we should go ahead with preparation of briefs.

The Court: Gentlemen, I don't—having tried the case, I can't see that it is a type of case for which briefs are necessary. The question of the sufficiency of the evidence was presented to me. There is only one important question of law and that has become moot, the objections to the instructions. The only objection to the instructions that Mr. Dunne made related to instructions upon the imputed liability to the father. Now, I worked on that very diligently so that both counsel and I finally reached a compromise whereby I gave an instruction to the effect that a new section included that responsibility but I also modified it to include the question of fact whether in fact he had control of the cause. As I said at that time, if the minor is emancipated and drives his own car, it is a question for the jury whether under the circumstances he could control it; but had the jury found against the minor, had they found him guilty of negligence, then the widow of the father—the jury rendered a verdict in favor of all three: the minor who drove the car, the widow of the father—I mean I should say, in

favor of the mother. I don't remember so many. It is hard to remember their first names—in favor of the widow of the young son.

Any question in view of that finding—any question in view of that question of fact—which means that he was not guilty of contributory negligence—then the question has become moot. It is immaterial whether legally the father is not responsible because he is not responsible for the negligence of the minor son who drove the car which the minor son owns and which is in his own name; and although he is not licensed, it becomes absolutely immaterial.

Mr. Boyd: I appreciate your Honor's position there. I merely didn't try the case.

The Court: Yes, I know that that is a disadvantage. I don't like the situation. I am sorry I didn't give instructions in time. I gave instructions not to accept the filing of any motions without consulting me—I mean not to accept a sitting, rather. Strike out filing. But by the time they heard about it, they found it had already been filed, on this date had been set.

It is very difficult to handle any matters relating to a new trial with any other attorney. In fact, I had a situation arise the other day against the Southern Pacific. I frankly expressed my surprise that Mr. Myers wasn't at least there. I said the difficulty I always find is this: that I can talk to the man who was at the trial at which I presided. An entirely different man who reads a cold record and tries to argue abstractions is——

Mr. Boyd: If your Honor please—

The Court: I am merely making a statement. I don't know of anything else that arises on which there is a question of law. Of course the usual allegations are made, the excessiveness of the verdict in the litigation which, of course, can be determined very quickly on the basis of the record. It all depends on the amounts awarded to the two widows—thirty thousand to one, plus the funeral expenses. That doesn't require briefing. That is a question for the Court to consider in the light of his own experience; and as I said in the case Caldwell against the Southern Pacific where you gentlemen were on the other end, where the motion was made by Mr. Hildebrand's firm that unless the verdict is very shocking one way or the other that I wouldn't substitute my judgment for that of the jury—and that is a criterion.

Mr. Boyd: If your Honor please, I would like to find your Honor's convenience when this matter could be presented.

The Court: Of course my convenience is right now. You know whenever you state a matter—in fact I travelled from the mountains, from a very pleasant atmosphere in order to take care of several matters, including this. In other words, when a motion for a new trial is set and it is to be heard, I am ready to hear it now.

Mr. Boyd: I merely want Mr. Dunne to be able to present it to you. Now I can get him down here. I don't like to do that, but if your Honor wants to hear it, I will do it, get him down here. Otherwise, I would suggest that Mr. Myers is

frequently in Los Angeles. That is no problem to appear before your Honor down there and we would be glad to do that if your Honor wants to set a definite date for the hearing.

The Court: I will not be back. I do need some vacation and I have already cut into the vacation month and will probably cut more, and we are all of us due in Seattle for the conference—for the judicial conference of our circuit which begins August 31st.

Mr. Boyd: Would your Honor be in San Francisco shortly thereafter?

The Court: Well, I have to come through San Francisco to go home unless I fly.

Mr. Boyd: Could we——

The Court: Well, let me see what there is here. Of course I would hear it in Los Angeles if you want to but I will not be there until after the middle of the month; and having been away, there will be quite a heavy law and motion calendar the first week; although it is my custom to dispose of matters in a district when I am visiting on the basis of it right in the district and that is one of the reasons why Judge Roche had my stay extended to the finish of the month so that I could dispose of every matter.

I am not going to—The observations I made are merely related not so much to hearing the matter. They relate to the proposition that I do not think that the problems are of the character that need briefing. They do not present any involved questions as to which I should put you to the task of writing a brief and counsel to reply

and put myself to using my eyes unnecessarily when the matter can be presented.

Mr. Boyd: I appreciate that.

The Court: It can be presented very very briefly. Mr. Dunne appreciated the difficulties we all have in trying to interpret that section, and I wavered from day to day as we all did trying to read certain language of the Supreme Court of California and finally it occurred to me that I ought to give the instruction I gave, exactly the instructions he propounded, with a slight modification, which I felt justified. He said he saw why, under the facts, I took the position I did, so maybe he can throw more light on it. But I am willing to grant that it is erroneous; but in view of the fact that the jury found that, as a matter of fact, the minor was not guilty—was guilty of contributory negligence——

Mr. Boyd: Yes.

The Court: Then the question of assumption of—the question of the responsibility for the—I got the wrong word. The question of attributing the negligence of the minor to the father or guardian has become a moot question; so in view of that fact, the point cannot be—it would be an abstraction.

Mr. Boyd: I appreciate that Mr. Dunne has quite a burden before him on this motion, but I know he wants to take on that obligation.

The Court: Well, I tell you gentlemen. Let me see——

Mr. Boyd: Any time in September will be convenient, if your Honor please.

The Court: Well, I rather not fix a date. I had rather not fix a date before my return, because there is the uncertainty——

Mr. Downey: Your Honor, any date is satisfactory to Mr. Myers. He is available now and will be any time the Court sets the matter.

The Court: Well, I don't want to crowd the matter, and as you know, I hesitate to come back to hear motions.

Mr. Boyd: Did your Honor want to continue this matter on your calendar here which Judge Roche can handle and we can be advised by your Honor what date is convenient?

The Court: Well, I can set the date now except, as I said, if there is no hurry, I can just set it for September with the understanding it may be heard down there, and if other matters should develop from any of the other cases—there is one which I filed an opinion on today so there might be further proceedings. I still have one matter undecided. It is to be briefed. So I think the best way is to set it for some date in September with the understanding that it is to be heard down there unless you hear from me to the contrary.

Mr. Boyd: Thank you.

The Court: All right, then, we will set it for—I will set it for the 20th.

Mr. Boyd: September 20th?

The Court: Monday, September 20th.

[Endorsed]: Filed November 9, 1948.]

[Endorsed]: No. 12153. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, Benjamin Souza, minors, by and through their Guardian ad Litem, Josephine Souza, Josephine Souza, individually, and Mary Adele Souza and Geraldine Souza, Lawrence Souza and Richard Souza, Minors, by and through their guardian ad Litem, H. G. Eastman, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 13, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12153

SOUTHERN PACIFIC COMPANYYY, a corpora-
tion,

Appellant,

vs.

JOHN MARTIN SOUZA, et al.,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD AGREEABLY
TO RULE 19(6)

Agreeably to Rule 19, paragraph 6, of the rules of the above Court, Appellant, Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely and its designation of the record as follows:

I.

STATEMENT OF POINTS

The points upon which appellant intends to rely are as follows:

1. The evidence is insufficient to sustain the verdict and judgment, and on that ground the trial court erred in denying the motion of appellant (defendant below) that the jury be directed to return a verdict in favor of appellant and, accordingly, the Court erred in denying appellant's motion for judgment notwithstanding the verdict.

2. Severally, as to each, the claim for damages on account of injury to John Martin Souza, the

claim for damages on account of damage to his automobile, the claim for damages on account of the death of Antonio Azevedo Souza and the claim for damages on account of the death of Edward Anthony Souza, the evidence is insufficient to sustain the verdict and judgment, in that it appears as matter of law.

(a) That the automobile involved in the collision herein was the automobile of John Martin Souza, that said John Martin Souza at the time and on the occasion of said accident, was driving and operating said automobile and that he so carelessly, negligently and unlawfully drove and operated the same as to proximately cause it to come into collision with a railroad locomotive of the defendant and that such conduct on the part of John Martin Souza was a proximate cause of any injury to him and of any damage to the automobile and the death of his father, Antonio Azevedo Souza, and the death of his brother, Edward Anthony Souza, and

(b) That said conduct of said John Martin Souza was the sole proximate cause of said injury, damage and deaths, and

(c) That said conduct of said John Martin Souza was and is, as matter of law, imputed to his said father and his said brother on the ground that all three were engaged in a joint venture, and

(d) That said conduct on the part of said John Martin Souza was and is, as matter of law, imputed to his said father on the ground that said John Martin Souza was, at the time and on the occasion of said accident, a minor and was driving and

operating said automobile with the knowledge and consent of his parents and of his father, and, in particular, said conduct was, and is so imputed by reason of Section 352(b) of the Vehicle Code of the State of California, and

(e) That each Antonio Azevedo Souza and Edward Anthony Souza was guilty of contributory negligence, and

(f) That there was no negligence on the part of defendant Southern Pacific Company which was a proximate cause of said accident or any resulting injury, damage or death.

3. That appellant's motions for a directed verdict and for judgment notwithstanding the verdict were erroneously denied and should have been granted and that judgment should be reversed with directions, severally as to each claim on account of injury, damage or death, to enter judgment for the appellant (the defendant below).

4. The Court erred in giving instructions and in denying instructions proposed by appellant, as defendant below, to which rulings appellant-defendant duly objected and excepted.

5. The Court erred in receiving evidence over the objections of appellant-defendant and particularly in receiving testimony of the witness Johnson (given by deposition) of statements claimed to have been made after the accident herein involved by the locomotive engineer, Glanville.

II.

DESIGNATION

Appellant hereby designates as all of the record which is material to the consideration of this appeal, and designates for printing, the whole of the certified record on appeal.

Dated: January 17, 1949.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Appellant

Southern Pacific Company.

(Affidavit of Service by Mail.)

[Endorsed]: Filed January 17, 1949. Paul P. O'Brien, Clerk.



**United States
Court of Appeals**

for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

**JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES
LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and
through their Guardian ad Litem, JOSEPHINE SOUZA, JOSE-
PHINE SOUZA, individually, and MARY ADELE SOUZA and
GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD
SOUZA, Minors, by and through their Guardian ad Litem, H.
G. EASTMAN,**

Appellees.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 417 to 451, Inclusive)

**Appeal from the United States District Court
for the Northern District of California,
Southern Division**

FILED
MAY 13 1949



United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

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LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and
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SOUZA, Minors, by and through their Guardian ad Litem, H.
G. EASTMAN,

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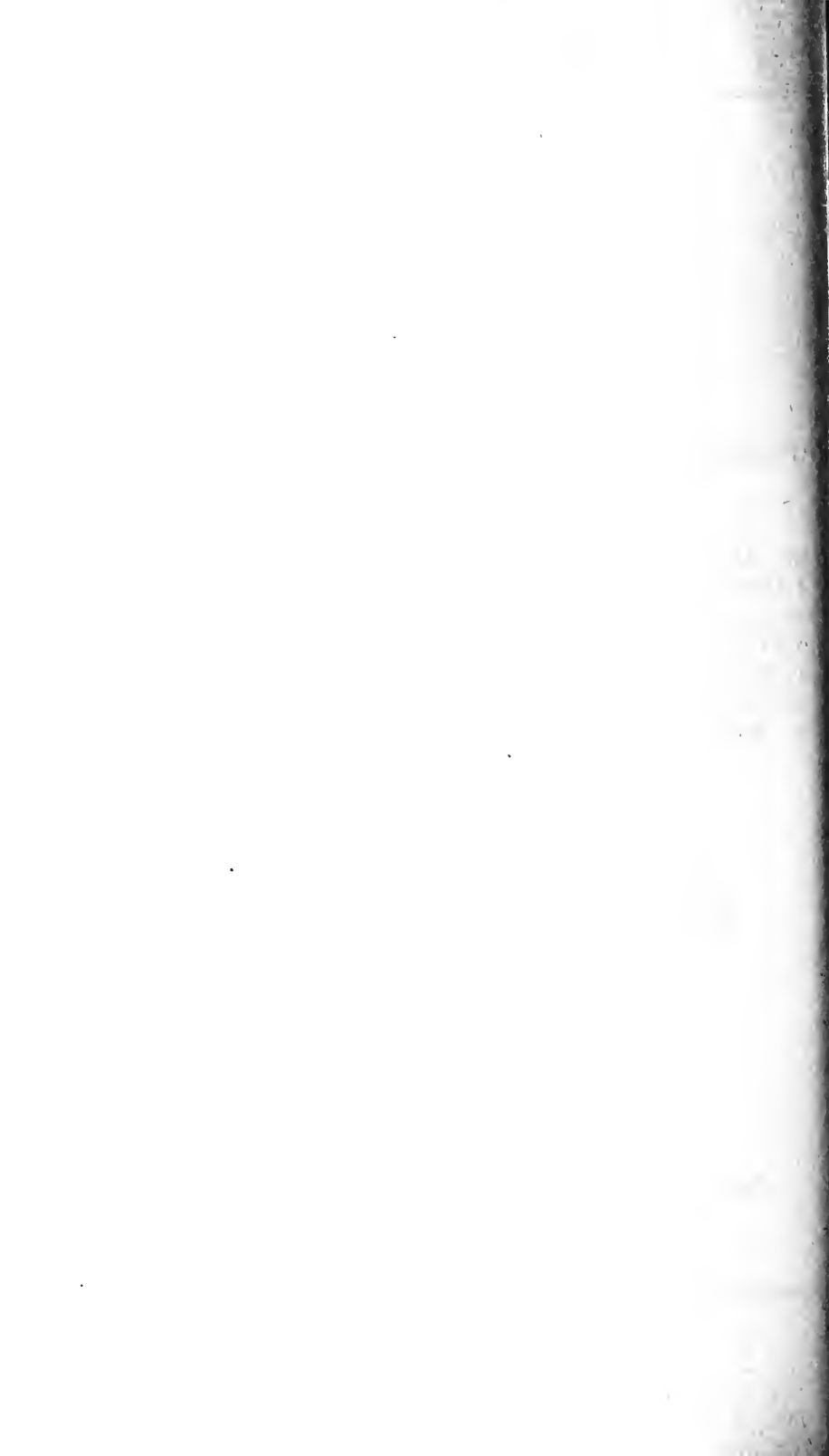
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Stipulation Correcting and Supplementing	
Transcript of Record	417
Deposition of H. J. Johnston:	
—direct	418
—cross	431
Instruction No. 9 Proposed by Plaintiff...	445
Instructions Proposed by Defendant:	
No. 27	445
No. 37	446
No. 38	447
No. 39	447
No. 56	448
No. 58	449
No. 58A	449
No. 58E	450

In the United States Court of Appeals
For the Ninth Circuit

No. 12153

SOUTHERN PACIFIC COMPANY,
a Corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and through their Guardian ad Litem, JOSEPHINE SOUZA, JOSEPHINE SOUZA, individually, and MARY ADELE SOUZA and GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD SOUZA, Minors, by and through their Guardian ad Litem, H. G. EASTMAN,

Appellees.

STIPULATION CORRECTING AND SUPPLEMENTING TRANSCRIPT OF RECORD

It is stipulated between the parties hereto, by their respective counsel, as follows:

I.

1. On p. 202 of the printed Transcript of Record herein (p. 149 of the original Certified Reporter's Transcript) it appears that the Deposition of H. J. Johnson was read. Said Deposition does not appear in the Transcript of Record and the whole of said Deposition was not read. Accordingly, at the point indicated, the record is supplemented and corrected by adding thereto the matter contained in paragraph 2 of this Part I of this Stipulation. Said matter is

substituted in the place of the matter appearing in the printed Transcript of Record, p. 202 (Original Certified Reporter's Transcript, p. 149) after the words, "The Court: All right," down to the words, "The Court: Call your next witness," on page 203 of the printed Transcript of Record (Original Certified Reporter's Transcript, p. 150).

DEPOSITION OF H. J. JOHNSTON

2. "Mr. Myers: Q. Will you state your full name, please? A. Howard John Johnston.

Q. How do you spell that?

A. J-o-h-n-s-t-o-n.

Q. Where do you live at present, Mr. Johnston?

A. At the Crane Hotel.

Q. How long have you lived there?

A. Oh, about four weeks or three and a half, somewhere around there.

Q. Where did you live before that?

A. I lived at 1138 Mission, Alex Hotel.

Q. How long did you reside there?

A. Oh, I would say about three weeks.

Q. Prior to that time where did you live?

A. In Florida.

Q. Where in Florida?

A. Hollywood, Florida.

Q. How long did you live in Hollywood, Florida?

A. Oh, somewhere between a year and a quarter of a year and a half, somewhere around there.

Q. During the time that you lived in Hollywood, Florida, were you employed? A. Yes, sir.

Q. And what as?

A. Assistant golf professional.

Q. Where? A. At Hollywood, Florida.

Q. The Hollywood Club, A. Yes.

Q. How old a man are you, A. Forty-three.

Q. What is your present occupation.

A. I am not doing anything; on a vacation.

Q. On the 11th of October, 1945, what was your occupation?

A. I was fireman on the Southern Pacific Railroad.

Q. How long prior to the 11th of October, 1945, had you been employed by the Southern Pacific Company as a fireman?

A. Oh, I would say about two months.

Q. Before that time had you had railroad experience? A. Yes.

Q. Whereabouts?

A. Well, I worked for the railroad out of—worked in the yard in Ogden, Utah.

Q. What company?

A. Gee, I can't even remember the company. It was owned by—the yards are owned by the Union Pacific and the Southern Pacific, and they have a name for it.

Mr. Dunne: Ogden Union Terminal and Depot Company? A. Yes.

Mr. Myers: Q. How long were you employed there? A. Two and a half months.

Q. How long after the 11th of October, 1945, did you remain in the employ of the Southern Pacific Company? A. Between two and three weeks.

Q. At that time—and when I say at that time I

mean around October 15, 1945, whereabouts did you live?

A. At the—when I was out on the road I lived in a hotel, but I lived at the clubhouse when I worked at Tracy, lived at the clubhouse; they have a clubhouse for the railroad men.

Q. That was maintained in Tracy for railroad men?

A. Yes. When I was in Sacramento I lived at a hotel; I don't even remember the name of it now.

Q. How long did you live in California prior to October 11, 1945?

A. Well, I—it was when I started working for the Southern Pacific, when I came down from Ogden, Utah. I would say around two months.

Q. All right. And then you left the employ of the Southern Pacific Company, which I believe you stated was about two weeks after October 11, 1945, what did you do then?

A. I went to work for the Western Pacific.

Q. Whereabouts?

A. In the Feather River Canyon, Portola or Oroville, worked the extra board there—worked the extra board there where they used to cover both divisions, the Eastern and the Western. The Eastern is from Portola to Winnemucca and the Western is from Portola to Oroville.

Q. How long did you work for the Western Pacific? A. Somewhere around three months or more, a little more.

Q. After you left their employ what did you do?

A. I didn't do much of anything. I hired out on the Santa Fe and they shipped me to Winslow, Arizona, and I turned the job down because they told

me it was a good job but when I got there they told me I had to work the extra board, and I worked the yard until I earned enough seniority to go on the road, and they promised me I was supposed to have a road job, but when I got this I refused the job and they paid my transportation back to San Francisco.

Q. Then when did you go to Florida?

A. Well, I didn't go to Florida then; I monkeyed around here quite a while; didn't do much of anything, there wasn't much to do, wasn't much work, so I couldn't get on the railroad. Things kind of dropped down and I didn't do much of anything, no actual work.

Q. When did you go to Hollywood, Florida, then?

A. Oh, I would say between a year and a year and a half ago.

Q. All right. Now, on the 11th day of October, 1945, were you a member of an engine crew employed by the Southern Pacific Company?

A. Yes, I was the fireman.

Q. And as such do you recall an accident that happened on the Southern Pacific right-of-way near Beckwith Road at a point west of—north of Modesto?

A. Yes.

Q. You were the fireman on that locomotive, were you?

A. Yes.

Q. And who was your engineer?

A. Glanville.

Q. Was there anyone else on the locomotive besides you and the engineer?

A. Yes, there was a brakeman.

Q. And do you recall the number of that engine?

A. No, I don't recall the number.

Q. What particular type of engine was it?

A. 2400.

Q. 2400 class? A. Yes.

Q. Was that a passenger train engine?

A. Yes, passenger.

Q. And at the time of the happening of this accident were you engaged in pulling cars or was the engine running light?

A. No, we were going light.

Q. So that as far as this particular engine was concerned you went on duty with that engine as a fireman at Fresno, is that right?

A. Yes. It was considered as a train, although it had no cars on it—had markers on it.

Q. It had markers on it? A. Yes.

Q. It was at Fresno when you went on duty?

A. Yes.

Q. Do you recall what time it was that you left Fresno? A. No, I don't recall that.

Q. Was it some time during the morning of October 11th? A. Yes, it was early morning.

Q. And this accident that happened out on the Southern Pacific right-of-way at the intersection of Beckwith Road, about what time in the morning was it that the accident happened? A. 9:05.

Q. Do you remember the weather, whether it was a clear day or what?

A. Clear, sunny morning.

Q. Did that engine for the train that you—did the engine have a train number designation or anything of the sort?

A. I don't know what you mean, what you mean by train number.

Q. Well—

A. Yes, it was Second 59, Second Section of 59.

Q. Do you recall where this engine had made its last stop before reaching the scene of the accident?

A. No. We made no stops; there were no stops I can recall, unless—no, there were no stops. We had no train.

Q. Have you any idea how far north of Modesto it was that this accident happened?

A. I would say somewhere around a mile.

Q. In other words, your next station would be Salida, is that correct?

A. Well, of course, I only made the run a couple of times and I really didn't know the stations, so I wouldn't know.

Q. You were out of the yard limits of Modesto though when this accident happened?

A. Yes.

Q. Now, you have been talking about an accident taking place. That was an accident between your locomotive and some other vehicle?

A. Yes, an automobile.

Q. What type of automobile was it?

A. It was a Ford coupe, kind of slate gray color.

Q. Did you see that automobile before the accident happened?

A. Yes, I saw it as it came up to the tracks.

Q. As it came up to the tracks was it traveling on this road we have just talked about? We can stipulate it was Beckwith Road, can we not?

Mr. Dunne: That is right.

Mr. Myers: Q. It was on this particular crossing when you saw it, was it? A. Yes.

Q. Was it on your side of the locomotive?

A. Yes.

Q. At that time your locomotive was northbound to the layman, but I suppose you railroad men would call it westbound? A. Westbound.

Q. In other words, going towards San Francisco?

A. Going towards Sacramento.

Q. Where was this automobile with reference to the tracks that your engine was traveling on when you first saw it?

A. Well, I saw it pull up, but the car was going slow; it looked like it was stopped, and I thought it was going to stop but evidently it didn't, and the next time I noticed it, why, it looked like it was going to be in front of the locomotive, so, of course, by then we were right on top of it and I yelled for an emergency stop to the engineer, and it was too late.

Q. Now, at any time did you see that automobile at a stop? Did you see that automobile at any time at a stop?

A. Well, it was kind of hard to judge. It looked like it was stopped; it wasn't going very fast. I don't say it was going over between five and ten miles an hour, and of course we were going pretty fast and it is hard to judge.

Q. How far was it from the tracks when you saw it?

A. Well, I saw it pull up and, well—where the post is, where the warning post is, I would say it was around there, and it looked like it was stopped, but evidently was not.

Q. You say it looked like it was stopped?

A. Yes. I couldn't say for sure, but it wasn't going very fast, I know.

Q. How many feet would you say it was from the crossing?

A. Oh, I would say somewhere around 200 or 250.

Q. I mean the automobile, how many feet from the crossing was the automobile, would you say?

A. Oh, I would say around 15, 10 or 15 feet.

Q. All right. At that time where was the locomotive with reference to the line of travel of this automobile on Beckwith Road, how far away was it?

A. Somewhere around 200 feet.

Q. How fast was the engine going at that particular time?

A. I would say between 65 and 70 miles an hour.

Q. For what distance had it been traveling at that speed of 65 or 70 miles an hour?

A. For a number of miles, I don't recall just how many, but for a number of miles—after we left Modesto.

Q. Now, this trainman that was in the cab of the locomotive, do you know how he happened to be in there? Was he one of the members of the crew?

A. No, he wasn't a member of the crew. He was just riding. He lived along the road there, the railroad some place, and I don't know exactly where it was but it wasn't very far from where the accident happened, and the engineer stopped to let him off at some crossroad.

Q. Now, when the engine was about 200 feet from the crossing, going at the speed that you have said it was going, can you tell us whether or not the whistle was blowing or the bell ringing at that time?

A. There was no whistle. He might have blowed

the whistle after we hit the car, I don't know, don't recall. I was nervous.

Q. But up to the time of the collision—

A. No, there was no whistle.

Q. How about the bell, was any bell ringing?

A. Well, there might have been a bell afterwards, but I turned the valve on and the bell didn't ring. I saw the car—I thought the car was stopped, and it wasn't necessary to use the hand cord.

Q. For a distance of a quarter of a mile prior to reaching the intersection of Beckwith Road and the Southern Pacific right of way can you tell us whether or not in that distance the bell was ringing or the whistle blowing, either one?

A. No, it wasn't.

Q. What, if anything, was the engineer and this other person that was riding in the cab of the engine doing at the time of the happening of the accident?

A. Well, they were holding a conversation.

Q. Where was the engineer? I mean by that what was his position at the time?

A. Well, in order so that this brakeman could hear him he was facing the brakeman, which would be facing me. I am across from him.

Q. In between you and the engineer?

A. The brakeman was right alongside of him, right close to him.

Q. Did the engineer do anything at all with reference to the operation of this engine before you called to him for an emergency stop?

A. No. He applied the brakes when I hollered.

Q. When he applied the brakes then what happened?

A. Well, we hit the car and knocked it over to the righthand side of the tracks and then got stopped as soon as possible, stopped and backed up to the accident.

Q. About how far from Beckwith Road was it that the engine came to a stop?

A. I would say about three city blocks.

Q. What is your estimate of the length of a city block that you have in mind when you say about three city blocks?

A. Well, I don't know, I would say somewhere around 250 or 300 feet, somewhere around there.

Q. To the block A. Yes.

Q. All right. When the engine backed up—I believe that is what you stated, that the engine backed up afterwards, is that right? A. Yes.

Q. After it had come to a stop it backed up, did it?

A. Yes.

Q. What, if anything, did you do then?

A. Well, I had to flag the engine because there was no flagman and it is the fireman's job when you have a light engine, why, it is his job to protect the train.

Q. How much time would you say elapsed between the time you called to the engineer "Emergency stop" and the happening of the accident?

A. Just a few seconds.

Q. What do you mean by a few?

A. Well, I would say two or three seconds.

Q. Did you see the car or any of the occupants of the automobile after the accident happened?

A. Yes. When we got backed up they had them laying out to the right on the road there, had them

laid out there. And the elderly man, he was dead. He was dead by the time we got back, and the one son, he was groaning and the way he was groaning it didn't look like he was going to live; and the other was laying out, kind of propped up like, looked like he had a broken arm or broken leg, I don't know, couldn't tell you—in fact, I couldn't spend much time there because I just glanced and then I had to go back and flag the train, the engine.

Q. Do you have any memory as to when, if at all, the whistle was blown or the bell was rung on the engine, prior to the time of the collision?

A. It was blown at some of the crossings. It might have been blown at the crossing prior to Beckwith Road, I don't quite recall.

Q. Other than that, you say that the whistle or the bell did not ring or blow up to the time of the collision?

A. That's right.

Q. You say this engine was a passenger type of engine. Did it have any distinctive marks on the front end of that engine?

A. Yes. They have them painted aluminum, silver aluminum or silver.

Mr. Myers: This is not meant to be the engine involved, Mr. Dunne, but I just want to show it to the witness.

Q. Is this a fair representation of the general appearance of that engine (showing photograph to witness)?

A. Yes, that is the type locomotive.

Q. And that shows a silver color in front of the boiler?

A. Yes, that is what I had reference to.

Q. That is a fair representation?

A. Yes."

Mr. Myers: I offer that.

Mr. Dunne: Mr. Myers, I can provide you with a photograph of the exact engine in place of this.

Mr. Myers: May I see it?

Mr. Dunne: Yes.

Mr. Myers: Your Honor, we will offer this photograph in evidence as plaintiff's exhibit next in order, which counsel says is a photograph of the engine involved in the accident.

Mr. Dunne: At the proper time I will put the other two in, then.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

(Reading resumed as follows:)

"Q. (By Mr. Myers): During the happening of the accident or immediately thereafter did the engineer make any comment at all as to the whistle blowing?"

Mr. Dunne: Your Honor, we will object to that upon the ground it calls for hearsay.

Mr. Myers: I think it is close enough to be part of the *res gestae*.

The Court: Where is that?

Mr. Dunne: It is at the top of page 20, if the Court please. The question begins at the last line on page 19, line 26.

The Court: Any statement at or near to it is admissible. If there is a sufficient lapse of time, then

it comes within the rule of narrative of past events, but any ejaculation or statement at or about the time is permissible, especially as this was not made to a third person who later on might be investigating it. I will allow it, and the weight to be given it is up to the jury, and I assume you will have the man referred to there to give his version of what took place. The objection is overruled. Read the question and answer now.

“A. Yes. After we got stopped—I don’t know whether he was talking to me or the brakeman—but he did say, ‘You see what happens when you don’t blow the whistle.’

Q. You say after you left the scene of the accident, at a point farther on the engine stopped to let off this trainman, is that right? A. Yes.

Q. Was that a scheduled stop?

A. No, just a roadway.

Q. Have you told us all you know about this accident?

A. Well, outside of after we let this brakeman off, why, the engineer went 45 miles an hour—that is the regulation speed of the locomotive—and he applied the brakes to see how far he would go by stopping, and it was around eight and a half poles.

Q. Eight and a half poles? A. Yes.

Q. How far would that be?

A. Well, not too far. I couldn’t name the distance.

Q. Would that be about the same distance it traveled after the accident happened?

A. Oh, no, no.

Q. In comparison to the distance it traveled after the accident how far?

A. Oh, I would say about a half a block, a little over a half a block maybe; maybe a block. I am not quite positive, but not more than a block and a half.

Q. Did you have a whistle cord? Did you have a bell cord attached to the bell? A. Yes.

Q. As well as the bell valve?

A. Yes, uh-huh.

Q. Did you pull that cord at any time?

A. No, I didn't get a chance to get at it. I had to shut the oil off and apply the brakes, and it looked like the car was going to stop where it was, and after all I thought it wasn't necessary, if the engineer didn't blow the whistle it wasn't necessary to ring the bell."

Mr. Myers: I think that is all.

Cross-Examination

"Q. (By Mr. Dunne): This test of making a stop at 45 miles an hour, that was made on the same day, was it? A. Yes.

Q. After the accident?

A. Yes, after the brakeman was out.

Q. Where was the brakeman let off?

A. Well, I don't know. I would say somewhere around three or four or five miles from where the accident was; I don't know, don't remember. After an accident like that you are excited and you just don't recall.

Q. That would be railroad west of the point of the accident, is that correct? A. Yes.

Q. What was the brakeman's name?

A. I don't know.

Q. Do you know now? A. No.

Q. Do you know the name of the place where this test was made?

A. No. All I know is that it was a road crossing.

Q. Along where, between what stations?

A. I don't recall that either.

Q. How did you know it was eight and a half poles?

A. Because we counted the poles, and he asked me to put that in my statement.

Q. And did you put it in the statement?

A. Yes, he sent me his accident report. I went back to Tracy and he sent me his accident report and I made mine out similar to his.

Q. When did he send you his accident report?

A. Oh, I would say it was about two days after the accident.

Q. Where were you when you made out your accident report?

A. In the hotel or club.

Q. At Tracy?

A. At Tracy, yes.

Q. What kind of a report was that that you made out?

A. Well, it was like his, just that it was a misstatement. The reason I made it out was that I was working for the railroad and he asked me to go along with him, and I did it for his protection.

Q. How did he ask you to go along with him?

A. Well, he said not to say anything about the brakeman being in the cab, and that he was blowing the whistle at the second—at the time of the accident he was blowing the whistle the second time.

Q. And where was it that he asked you to say that?

A. Well, we stopped after we got to Sacramento;

we stopped and we had a couple of beers and lunch.

Q. That was on the day of the accident?

A. Yes, it was after we got to Sacramento.

Q. When did he make out his report?

A. Well, he said that he was nervous and he wasn't going to make it out that day, and he would make it out and send it to me.

Q. And you didn't make yours out that day?

A. I didn't make it out until he sent me his.

Q. What kind of form did you make it out on?

A. I don't know the name of the form, but it is just an accident report.

Q. Why didn't you make one out at the round-house in Sacramento?

A. Because the engineer didn't want it that way, and nobody asked me to.

Q. You knew you were supposed to make one out without being asked, didn't you?

A. Yes, I knew that.

Q. You knew you were supposed to make them out quickly, didn't you?

A. Yes, I realized that, but I figured, 'Well, I don't like to see a man lose his job,' and I figured that he would.

Q. Who handles the bells? A. I do.

Q. Did you say anything in that statement as to the bell, as you now recall, about the bell?

A. Naturally I did.

Q. What did you say about the bell?

A. I said it was ringing.

Q. That would be up to you? A. Yes.

Q. You wouldn't be protecting the engineer saying anything about the bells, would you?

A. No.

Q. Now, can you fix any better for me the place where that test was made?

A. Well, outside of it was just a few miles beyond the accident, after the brakeman was out of the cab. I just don't recall where it was. After all, it is a couple of years and I actually didn't know the road myself.

Q. What kind of track was it at that point?

A. One track.

Q. Level or curved? A. Level.

Q. Straight or a curve? A. Straight.

Q. These poles, what kind of poles were those?

A. Those are poles alongside the tracks. I would say they are, oh—well, I don't know what you call them.

Q. Poles that carry wires along by the tracks?

A. Yes.

Q. Telegraph wires, is that right?

A. Yes.

Q. Now, whatever you may have said about the whistle blowing or the bell ringing, the statement that you stopped in eight and a half pole lengths is the truth? A. Yes.

Q. That is, at the time of this test?

A. Yes.

Q. Now, right before the accident did you hear the engineer say anything?

A. No. He was talking to the brakeman.

Q. Do you know what he said?

A. No, I couldn't hear him. I don't know what the conversation was about.

Q. After the accident what, if anything—just

tell me everything that you can remember that the engineer said.

A. Well, he said, 'See what happens when you don't blow the whistle.' So I backed up and there wasn't anything said until after we got going, and I held no conversation with him until after the brakeman got out. And then he said he was going to make a test stop.

Q. That is the only thing then, from the time of the accident until—at least until you backed up to the point of the accident, that the engineer said, 'See what happens when you don't blow the whistle,' is that right? A. Yes.

Q. Did he say anything about the bell valve?

A. No.

Q. Did he say anything to you about not ringing the bell? A. Yes.

Q. How does the bell on that locomotive operate?

A. Valve.

Q. As I understand it, you left Fresno that morning? A. Yes.

Q. Have you any idea what time you left?

A. I don't recall. I know it was early in the morning.

Q. The first stop you made was at the time of the accident, is that right?

A. Yes, that is, an actual stop. We slowed down at times before.

Q. Do you remember where you slowed down?

A. No, I don't recall. I told you I don't know the road. I couldn't remember; I wouldn't know where the hell we did slow down.

Q. You know Modesto, don't you?

A. Yes.

Q. Do you know any towns between Modesto and Fresno?
A. Not that I can recall now.

Q. Was the bell ringing coming out of Fresno?

A. Yes.

Q. Automatic bell ringer?
A. What?

Q. The automatic bell ringer?
A. Yes.

Q. How long did it ring after you left Fresno?

A. Oh, I just don't recall. Sometimes they will ring and sometimes they won't.

Q. Did you shut it off at any time after you left Fresno?

A. Naturally you open it up and shut it off.

Q. Where did you shut it off?

A. Well, at some crossings I would shut it off.

Q. I want to know where you shut it off the first time after you left Fresno.

A. I don't remember.

Q. You don't remember whether you shut it off at all?

A. Sure, I shut it off. It was shut off when I turned it on before the accident.

Q. After you shut it off the first time did you turn it on again before you got to Modesto?

A. Yes, I had it ringing before we got to Modesto, I remember that.

Q. Was it ringing going through Modesto?

A. Well, I believe at some crossings it was and at some I had to use the rope.

Q. It would shut off even if you didn't shut the valve off?

A. Sometimes it would work and sometimes it wouldn't.

Q. After it got started ringing then it would shut off by itself? A. It wouldn't even start.

Q. After it got started, when it was ringing with the automatic bell ringer?

A. Usually when it got started it would keep on ringing.

Q. It was ringing going through Modesto, is that right? A. Yes.

Q. Now, did you shut it off after you passed the station at Modesto?

A. Naturally. I am not going to have the bell ringing, if it is working, but some of the times it wouldn't work.

Q. But it didn't shut itself off after it got started? If it was ringing through Modesto did you shut it off after you passed the station at Modesto?

A. I told you it wasn't ringing at every crossing. It wouldn't ring. I turned the valve on and it wouldn't ring and I would have to use the hand cord. After that, maybe at the next crossing, I would turn it on and it would work.

Q. Well, let us get this. As you went by the station at Modesto was it ringing?

A. Ringing?

Q. Yes. A. No.

Q. Wasn't ringing at the station at Modesto?

A. Raining?

Q. No, ringing.

A. I thought you said 'raining'.

Q. No, ringing.

A. Yes, it was ringing at the station. I don't recall—if the automatic valve didn't work I would use

the cord. I don't remember whether I used the cord at Modesto or not.

Q. Do you remember using the cord at Modesto any place that day?

A. Yes, I used it; I had to use it.

Q. Where did you use the cord?

A. I don't recall the places.

Q. You don't know whether you were using the cord at Modesto?

A. I told you at some of the crossings at Modesto I used the cord. I had to because the valve wouldn't start the bell.

Q. How about the station, were you using the cord there?

A. Yes, you have to have the bell going through a station.

Q. Were you using the cord at the station or was the bell ringing on the automatic bell ringer?

A. I don't recall that now.

Q. Do you recall any point where it was operating with the automatic bell ringer?

A. I don't recall the places. Sometimes it would ring. There is a lot of crossings going through Modesto. At some crossing it would work and some it wouldn't.

Q. Sometimes they won't start when they are right on center, is that right?

A. You mean the bell?

Q. Yes.

A. No, they will start if they have enough air.

Q. Did you ever have to turn the valve and then give it a start with the cord and then it will ring by itself?

A. Yes, you have to do that sometimes.

Q. If I understood you correctly—and you correct me if I am wrong about this—that going through Modesto and from Modesto on you now have no recollection of whether the bell was ringing by the automatic bell ringer or whether you were operating it by the cord, pulling the cord? A. Yes.

Q. That is right? A. Yes.

Q. And you have no recollection how long it rang after you left the station at Modesto?

A. Well, I don't know what you mean, how long it rang. You don't turn the bell on and keep it ringing many miles.

Q. Was the bell ringing at the crossing that you came to before the one at which this accident happened? A. I don't recall.

Q. If you don't recall you wouldn't know whether you shut it off or not, would you?

A. Well, I think I would know if it was going from crossing to crossing, when it was ringing. I don't know whether I used the cord or the valve at the crossing before.

Q. Was it ringing at that crossing?

A. Yes, it was ringing at that crossing.

Q. By the way, did you make any report that the bell ringer wasn't working?

A. No. That would involve myself and the engineer.

Q. So far as you were concerned, you didn't make a report on it?

A. The engineer said not to.

Q. He also said not to make a report that the bell ringer wasn't working? A. Absolutely.

Q. How fast did you run between Fresno and Merced? A. Merced?

Q. Yes. A. How fast?

Q. Yes. A. Was he running?

Q. Yes. A. At the time of the accident?

Q. No, no, between Fresno and Merced.

A. I don't recall Merced.

Q. How fast did you run between Modesto and Merced?

A. I don't remember Merced. But after the accident he run 45 miles an hour.

Q. How fast did he got through Modesto?

A. Plenty fast, fast enough.

Q. How fast in miles per hour?

A. Oh, I would say he was doing 45 anyway.

Q. From the time you left Fresno until the time of the accident what was the slowest that you went?

A. Well, the slowest we went was in through Modesto.

Q. That 45 miles an hour, is that right?

A. Yes.

Q. So from Fresno to the point of the accident the locomotive, once you got rolling was going 45 miles an hour or better? A. Better.

Q. Are you a married man? A. Not now.

Q. Were you married in 1945? A. No.

Q. You were not married then at the time you first came to California? A. No.

Q. Had you been married at any time between the time you first came to California and now?

A. No.

Q. Before you first came to California and now?

Q. Before you first came to California you were railroading at Ogden, is that right? A. Yes.

Q. What were you doing there for the company at Ogden? A. Firing.

Q. Where had you come from when you went to Ogden? A. Pennsylvania.

Q. Where is your home? Where was your home before you came to Ogden? A. Pennsylvania.

Q. How long had you lived there in Pennsylvania before you came to Ogden?

A. I was born in Pennsylvania.

Q. When you were in Pennsylvania what was your business?

A. I worked for the railroad.

Q. Had you railroaded there? A. Yes.

Q. What railroad did you work for there?

A. The Pennsylvania.

Q. In what capacity?

A. Well, I worked as a—worked in the round-house. I didn't work all the time on the Pennsylvania; I worked on other railroads. I don't think it is necessary that that information—don't like to give that information.

Q. Where did you work in Pennsylvania?

A. At Erie.

Q. What name did you work under?

A. My name.

Q. Have you ever worked for a railroad under any other name? A. No.

Q. What other railroads besides the Pennsylvania did you work for?

A. Well, I worked for a number of them. I have worked—well, I don't like to tell all the railroads.

Q. Then you refuse to answer that question?

A. Yes, I refuse to answer. I don't think it has any bearing on the accident.

Q. How long did you work for the Pennsylvania?

A. About fifteen years.

Q. And how long all together did you work for other railroads?

A. Well, I think I worked about seventeen or eighteen years, somewhere around there.

Q. What business were you engaged in just before coming to Ogden?

A. I worked for an aluminum plant.

Q. You said that you had worked as an assistant golf professional at the Hollywood Club in Florida. Had you worked as a *gold* (golf) professional before this accident?

A. Yes, years ago, before I went on the railroad.

Q. Now, after you left the Southern Pacific you went to the Western Pacific and were there for a while and then you went to the Santa Fe and they sent you to Winslow, Arizona, is that correct?

A. Yes.

Q. Do you remember about the date of that?

A. No, I don't recall.

Q. And then you came back to San Francisco, is that correct?

A. Yes.

Q. Do you remember about what date you came back to San Francisco?

A. I don't know.

Q. Can you fix it with reference to Christmas of 1946?

A. Yes. It was after Christmas. I was working for the Western Pacific at Christmas time.

Q. That is Christmas of 1946?

A. Yes.

Q. How did you happen to come out to San Francisco this last trip?

A. Well, I received word from my folks about this accident.

Q. I want to show you this and ask you if this is your signature—all the writing on that page is in your handwriting? A. That's it.

Mr. Dunne: I will offer this in evidence as our exhibit and ask the reporter to mark it.

(Document marked by Notary Public as Defendants' Exhibit 1.)

Q. (By Mr. Dunne): Are you expecting to leave the State of California soon?

A. I think possibly I will.

Q. Will you return to Florida then?

A. Yes, I think I will.

Q. Florida is your home at the present time, is it?

A. Yes.

Q. And before coming to Ogden, Pennsylvania has been your home? A. Yes.

Q. And those are the only two regular homes you have had?

A. Well, no, not exactly. I have stayed at other places but not too long, not long enough to call it a home.

Q. When you came out to California from Pennsylvania and took these various jobs, it was just a temporary proposition?

A. Yes. I realized that when I came out.

Q. You expect to go back East? A. Yes.

Mr. Dunne: I have no further questions."

Mr. Myers: Do I understand counsel is not inquiring into the motives, then?

Mr. Dunne: No, the only part of the impeachment is the statement which is attached to the original deposition, if your Honor please.

The Court: All right. Now you may read the statement.

Mr. Dunne: May we have it detached and marked?

The Court: I think you had better detach it. The jurors may want to see it and, as you know, we never send depositions out to the jury.

Mr. Myers: May I ask your Honor, are there any other exhibits there besides the statement?

Mr. Dunne: I think just the photograph.

(The statement referred to was thereupon received in evidence and marked Defendant's Exhibit Q.)

Mr. Dunne: If your Honor please, before reading it may I exhibit it to the jury so they may see its form and I might explain the form to them?

The Court: Very well.

(The Defendant's Exhibit Q was thereupon read to the jury.)

Mr. Myers: There is nothing on the back except the reporter's notation, the reporter who took the deposition.

The Court: The clerk will detach it and give it a proper number, and I think I have already informed you that when you begin your deliberations you are entitled to see all those exhibits which have been introduced in evidence. Some of them you have seen,

some of them counsel have referred to, and some of them they have called your attention to, knowing that you can have them all when you begin your deliberations.

II.

The record is augmented by adding thereto the following:

Plaintiff's proposed Instruction No. 9 was as follows:

Plaintiff's Instruction No. 9

You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution and cause a bell to be rung or whistle blown, as required by law.

Lahey v. Southern Pacific Co., 16 Cal. App. (2d) 662.

The following instructions were proposed by the defendant:

Defense Instruction No. 27

In considering the conduct of those in charge of the railroad locomotive and in passing on the claim that defendant was guilty of negligence in operating and propelling it, you will bear in mind that the engineman, until put on notice to the contrary, had the right to assume and presume that any person operating an automobile toward or onto the railroad track would perform the duty which the law of this State imposes upon the driver of such an automobile

and, in the reasonable exercise of his faculties of observation and caution, would not attempt to cross the track in dangerous proximity to an approaching railroad locomotive if the same were plainly open to view so that collision with the locomotive could be avoided if the automobile driver exercised reasonable care and complied with the duties imposed upon him by law. Accordingly, in consideration this case, you must consider the duties which the law imposed upon John Martin Souza, the driver of the automobile, in the operation of that automobile, as he approached the railroad track, not only from the point of view of determining whether there was any negligence on his part, but also from the point of view of the bearing which the duties he was required to perform, and which in the absence of notice to the contrary the enginemen were entitled to assume he would perform, may have on the claim of negligence on the part of defendant.

Billig v. S. P. Co., 192 Cal. 357;

Church v. Payne, 36 CA 2d 382 (hr. den.).

Defense Instruction No. 37

By Section 352(b) of the California Vehicle Code, in effect at the time of this accident, it is provided that any negligence of a minor, whether licensed or not under that code in driving a motor vehicle upon a highway with the express or implied permission of his parents, shall be imputed to such parents for all purposes of civil damages. Accordingly, if in this case there was any negligence on the part of the driver, John Martin Souza, which was a proximate cause of the accident and death of his father Antonio

Azevedo Souza, such negligence is to be imputed to the father with the same effect as though the father himself had been guilty of negligence.

Solloway v. Watts, 58 CA 2d 595;

Grover v. Sharp, etc., Co., 66 CA 2d 736 (hr. den.);

Milgate v. Wraith, 19 C 2d 297;

Rawlins v. Lory, 44 CA 2d 20, 25.

Defense Instruction No. 38

If you find that at the time of this accident John Martin Souza and his brother, Edward Anthony Souza, in the use and operation of the automobile were engaged in a joint venture or enterprise, and in the use of the automobile were engaged in a common undertaking in which they had a community of interest and in respect of which each exercised or had the right to exercise an equal or joint control and direction and there was, in the use of the automobile, a mutual agency such that the driver, although he was the owner of the automobile, was operating it not alone for his own benefit, but as well for the benefit of his brother and as his agent, then, any negligence on the part of the brother John Martin Souza, who was driving the automobile, is to be imputed to the deceased brother Edward Anthony Souza with the same legal effect as though the deceased brother himself had been guilty of negligence.

Defense Instruction No. 39

Even if you should find that the father, Antonio Azevedo Souza, was not himself negligent or that the deceased brother, Edward Anthony Souza, was not himself negligent, still, if the brother and son

who was driving, John Martin Souza, was guilty of contributory negligence in the operation of the automobile and under the facts of the case and the instructions, his negligence is to be imputed to either the deceased father or the deceased brother there can be no recovery on account of the death of the person to whom such negligence is to be imputed and the negligence of the driver will have the same legal effect to bar any recovery for death as though the person to whom such negligence is imputed had himself been guilty of contributory negligence.

Defense Instruction No. 56

If the driver of the automobile, on the occasion of the accident complained of, and in view of the physical facts then existing at the scene of the accident, had he exercised ordinary care, must have learned of the approach of the locomotive in time to have avoided collision with it, by using ordinary care, then the very fact that the automobile collided with the engine raises a presumption that he did not take the required precautions and did not look or listen (*Loftus v. Ry.*, 166 Cal. 464; *Koster v. S. P.*, 207 Cal. 753), or that, having looked and listened, he endeavored to cross immediately in front of the approaching train, and in either of such events, if so you find, his conduct would constitute negligence proximately contributing to the accident.

Guyer v. P. E. Ry. Co., 24 CA 2d 499, 502 (hr. den.), q. in *Hereoux v. Atchison, etc., Co.*, 28 CA 2d, 401 (hr. den.);

Dull v. Atchison, etc., Co., 27 CA 2d 473, 477;
Lindley v. S. P. Co., 18 CA 2d 550 (hr. den.).

Defense Instruction No. 58

Neither the court nor the jury is bound by the mere declaration of a witness, no matter how improbable, incredible, or impossible that declaration may be. The court or jury is only bound by swearing credibility, that is to say, credible swearing is all that is to conclude either the court or the jury in its judgment. It is not enough for a witness to say that he looked with unseeing eyes or listened with unhearing ears. If the established facts and conditions, including the physical surroundings at the scene of the accident, were such that before the accident, and before leaving a place of safety, the driver John Martin Souza, if he had looked in the direction from which the locomotive came, must have seen it in time to have avoided being struck by it, by exercise of reasonable care, and must have seen it while he was in a place of safety, then I instruct you that any testimony, if such there has been, that in such circumstances he did look, but did not see the locomotive, may be disregarded by you.

So. R. Co. v. Walters, 284 U.S. 190, 76 L.Ed. 239;

U.S. v. Ingalls, 67 F2d 593 (CCA 10);

Deadrich v. U.S., 74 F2d 619 (CCA 9);

Loftus v. Ry. Co., 166 Cal. 464;

Chrissinger v. S. P. Co., 169 Cal. 619;

Hughes v. Atchison, etc., Co., 121 CA 271 (hr. den.).

Defense Instruction No. 58-A

The mere fact that Antonio Azevedo Souza and Edward Anthony Souza were not physically driving

and operating the automobile did not relieve them or either of them from the duty of exercising reasonable care in respect of the operation of the automobile, and each as to his own safety. To the contrary, each was at all times under a duty to exercise such care.

Defense Instruction No. 58-E

Section 596 of the Vehicle Code of the State of California applied to the operation of the automobile involved in this accident. That statute provided:

“No person shall drive a vehicle when it is so loaded, or when there are in the front seat such number of persons as to *abstruct* the view of the driver to the front or sides of the vehicle or to interfere with the driver’s control over the driving mechanism of the vehicle.”

A violation of that statute, if any, constitutes negligence as matter of law. In addition, if there were three people in the front seat of the Ford coupe, if the deceased Edward Anthony Souza was one of those three people if their presence in the front seat, and particular his presence, obstructed the view of the driver to the front or sides of the Ford coupe, or interfered with the driver’s control of the driving mechanism of the vehicle, and he was aware of this and knowingly so placed himself and remained in the Ford automobile so as to bring about such obstruction of the view of the driver or interference with control over the driving mechanism, he was guilty of negligence and no recovery can be had on account

of his death, if that negligence was a proximate cause of the accident.

/s/ JAMES A. MYERS,
/s/ CLIFTON HILDEBRAND,
HILDEBRAND, BILLS &
McLEOD,

Attorneys for Appellees.

/s/ ARTHUR B. DUNNE,
/s/ DUNNE & DUNNE,

Attorneys for Appellant.

[Endorsed]: Filed April 27, 1949. Paul P. O'Brien,
Clerk.



No. 12,153

IN THE
United States
Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and through their Guardian ad Litem, JOSEPHINE SOUZA, JOSEPHINE SOUZA, individually, and MARY ADELE SOUZA and GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD SOUZA, Minors, by and through their Guardian ad Litem, H. G. EASTMAN,

Appellees.

Appellant's Opening Brief

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SUBJECT INDEX

	Page
I. Pleadings, Proceedings and Jurisdiction.....	1
II. Statement of the Case.....	7
III. Summary of Points to Be Discussed.....	11
IV. Specification of Errors.....	12
V. Argument	19
A. The Rights and Duties of the Railroad and High- way Traveler at a Grade Crossing Are Settled and Rules Fixing Standard of Care Required of High- way Traveler Are Established as Matter of Law.....	19
B. The Driver of the Automobile, John Martin Souza, Was Guilty of Contributory Negligence as Matter of Law	31
C. The Contributory Negligence of the Driver John Souza Is Imputed by Law to His Father, Antonio Azevedo Souza	39
D. Error in the Giving of Plaintiff's Proposed Instruc- tion No. 9 and in the Refusal of Defendant's Pro- posed Instruction No. 27.....	42
E. The Question of Joint Venture Should Have Been Submitted to the Jury and It Was Error to Refuse Instructions Properly Submitting the Issue.....	60
F. Other Errors in Instructions.....	61
Conclusion	63

TABLE OF AUTHORITIES CITED

	PAGES
CASES	
Argo v. S. P. Co., 39 C.A.2d 706, 104 P.2d 77.....	31, 38
Arnold v. S. F. O. T. Rys., 175 Cal. 1.....	48
Atchison, etc. Co. v. McNulty, 285 F. 97 (C.C.A. 8), cert. den. 262 U.S. 746, 67 L.ed. 1212.....	29, 30
Babcock v. P. G. & E. Co., 120 Cal. App. 218, 224, 7 P.2d 736 (hr. den.)	20n
Baltimore & Ohio Railway v. Goodman, 275 U.S. 66, 72 L.ed. 167, 48 Sup. Ct. Rep. 24.....	22
Bashan v. S. P. Co., 176 Cal. 320, 324.....	47, 50n, 52n
Billig v. S. P. Co., 192 Cal. 357, 362, 219 P. 992.....	20n, 21, 28, 49, 52n
Bilton v. S. P. Co., 148 Cal. 443, 83 P. 440.....	29
Busch v. L. A. Ry. Co., 178 Cal. 536, 539.....	49
Calif. Rendering Co. v. P. E. Ry. Co., 205 Cal. 73, 76, 269 P. 922	19n, 20n, 24, 26, 27, 28, 36, 39
Calloway v. Penn. R. Co., 62 F.2d 27 (C.C.A. 4).....	45
Cate v. Fresno T. Co., 213 Cal. 190, 2 P.2d 364.....	28, 29, 63
Chicago etc. Co. v. Houston, 95 U.S. 697, 24 L.ed. 542.....	29, 45
Choquette v. Key System Transit Co., 118 Cal. App. 643, 5 P.2d 921.....	52n
Crissinger v. S. P. Co., 169 Cal. 619, 149 P. 175.....	21n, 26, 30
Depons v. Ariss, 182 Cal. 369, 380.....	49
Dolon v. Green, 72 C.A.2d 427, 436.....	52
Flannelly v. Delaware & H. Co., 225 U.S. 597, 603 (44 L.R.A. (N.S.) 154), 56 L.ed. 1221, 32 Sup. Ct. Rep. 783....	23
Flemming v. W. P. R. Co., 49 Cal. 253.....	27, 31, 43
Glascock v R. R. Co., 73 Cal. 137, 14 P. 518.....	29
Gore v. Market St. Ry. Co., 4 C.2d 154, 157.....	52
Green v. L. A. etc. Ry. Co., 143 Cal. 31, 35, 76 P. 719	19n, 21, 24, 25, 26, 44, 48, 50n, 52n
Green v. So. Cal. Ry. Co., 138 Cal. 1, 70 P. 926.....	24, 26, 31, 43
Green v. S. P. Co., 132 Cal. 254, 259, 64 P. 255.....	21n, 29, 52n

	Pages
Griffin v. S. P. etc. Co., 170 Cal. 772, 151 P. 282.....	21n, 25, 29, 31, 45, 46n
Griswold v. Ry. Co., 45 Cal. App. 81, 187 P. 65.....	26
Grover v. Sharp etc. Co., 66 C.A.2d 736, 153 P.2d 83 (hr. den.)	4n, 40
Hager v. S. P. Co., 98 Cal. 309, 33 Pac. 119.....	31
Hamlin v. P. E. Ry. Co., 150 Cal. 776, 778, 89 P. 1109.....	19, 20
Herbert v. S. P. Co., 121 Cal. 227, 53 P. 651.....	19n, 21, 26, 27, 29, 31, 43
Heroux v. A., T. & S. F. Ry. Co., 28 C.A.2d 401, 82 P.2d 738	29
Hoffart v. S. P. Co., 33 C.A.2d 591, 92 P.2d 436.....	31, 52
Hoffman v. S. P. Co., 84 Cal. App. 337, 258 Pac. 397.....	31
Holmes v. S. P. etc. Co., 97 Cal. 161, 31 P. 834.....	21, 43, 47, 52n
Hughes v. Atchison, etc. Co., 121 Cal. App. 271 (hr. den.), 8 P.2d 853.....	30
Hutson v. So. Cal. Ry. Co., 150 Cal. 701, 89 P. 1093.....	21n, 29, 31, 42
Jones v. S. P. Co., 34 Cal. App. 629 (hr. den.), 168 P. 586.....	29, 30
Koch v. Southern Cal. Ry. Co., 148 Cal. 677.....	44
Korchack v. Pac. Elec. Ry. Co., 9 C.A.2d 89, 93, 48 P.2d 752	53n
Koster v. S. P. Co., 207 Cal. 753, 766, 279 P. 788.....	17, 19n, 21, 21n, 22, 26, 27, 29, 32n, 45
Kramm v. Stockton etc. Co., 3 Cal. App. 606, 614, 86 P. 738 (hr. den.)	20
L. A. T. Co. v. Conneally, 136 Fed. 104 (C.C.A. 9).....	20n
Lambert v. S. P. R. Co., 146 Cal. 231.....	48
Larrabee v. W. P. R. Co., 173 Cal. 743, 161 P. 750.....	29, 31, 45
Lee v. Market St. Ry. Co., 135 Cal. 293, 67 Pac. 765.....	51n
Levin v. Brown, 81 C.A.2d 913, 185 P.2d 329.....	21n, 53
Loftus v. P. E. Ry. Co., 166 Cal. 464, 137 P. 34.....	17, 21n, 27, 30
Lund v. P. E. Ry. Co., 25 Cal.2d 287, 153 P.2d 705.....	20, 20n
Martin v. S. P. Co., 150 Cal. 124, 88 P. 701.....	24, 44
Martindale v. A., T. & S. F. Ry. Co., 89 A.C.A. 459 (1948)...	62
Martz v Ry. Co., 31 Cal. App. 592, 161 P. 16.....	29

	Pages
Matteson v. S. P. Co., 6 Cal. App. 318.....	51
McNabb v. Va. Ry. Co., 55 F.2d 137 (C.C.A. 4).....	30
McNeil v. East Bay Street Rys., 220 Cal. 591, 598.....	49, 50
Milgate v. Wraith, 19 C.2d 297, 121 P.2d 10.....	4n, 40
Murray v. S. P. Co., 177 Cal. 1, 169 P. 675.....	27
N. Y. etc. Co. v. U. R.R., 191 Cal. 96, 100, 215 P. 72.....	20n, 21, 28
Northern P. R. Co. v. Freeman, 174 U.S. 379, 43 L.ed. 1014	29, 30, 44
O'Neill v. Reading Co., 296 Pa. 319, 145 Atl. 840.....	30
Pacheco v. S. P. Co., 129 Cal. App. 610, 19 P.2d 251.....	24, 26
Parker v. S. P. Co., 204 Cal. 609, 269 P. 622.....	21n, 28
Penn. R. Co. v. Yingling, 148 Md. 169, 129 Atl. 36.....	30
Pepper v. S. P. Co., 105 Cal. 389, 401, 38 P. 974.....	27
Pullman Company v. Hall, 46 F.2d 399.....	59
Rather v. San Francisco, 81 C.A.2d 625.....	52
Rawlins v. Lory, 44 C.A.2d 20, 111 P.2d 973.....	4n, 40
Riney v. P. E. Ry. Co., 45 Cal. App. 145, 148, 187 P. 50.....	20, 26
Rio Grande W. Ry. Co. v. Leak, 163 U.S. 280, 41 L.ed. 160, S.Ct. 1020	59
Robbins v. S. P. Co., 102 Cal. App. 744, 752, 283 P. 850.....	29
Robinson v. Oregon-W. etc. Co., 90 Ore. 490, 176 P. 594.....	26
Rowe v. So. Cal. Ry. Co., 4 Cal. App. 1, 5, 87 P. 220.....	20n
Runnels v. U. R. R., 175 Cal. 528, 531, 166 P. 18.....	20n
Schofield v. Ry. Co., 114 U.S. 615, 29 L.ed. 224.....	44
Schooley v. Fresno Traction Co., 56 Cal. App. 705, 711.....	51
Scott v. San Bernardino etc. Co., 152 Cal. 604, 93 P. 677.....	19n, 29
Sego v. S. P. Co., 137 Cal. 405.....	44
Shannon v. N. W. P. R. Co., 209 Cal. 303, 287 P. 91.....	27, 38
Solloway v. Watts, 58 C.A.2d 595, 137 P.2d 477.....	4n, 40
Southern P. Co. v. Berkshire, 254 U.S. 415, 419 (65 L.ed. 335, 337, 338, 41 Sup. Ct. Rep. 162).....	23
S. P. Co. v. Day, 38 F.2d 958 (C.C.A. 9).....	22, 44
Stephenson v. N. W. P. R. Co., 208 Cal. 749, 284 P. 913.....	26, 37
Switzler v. Atchison, etc. Co., 104 Cal. App. 138, 285 Pac. 918	62

Pages

Thompson v. Los Angeles etc. Co., 165 Cal. 748, 134 Pac. 709	48n
Thompson v. S. P. Co., 31 Cal. App. 567, 161 P. 21.....	27
U. P. R. R. Co. v. Rosewater, 157 F. 168 (C.C.A. 8).....	30
Vilhauer v. P. E. Ry. Co., 118 Cal. App. 240, 4 P.2d 960.....	26
Wagner v. Atchison Co., 210 Cal. 526, 292 P. 645.....	62
Weiss v. Bethlehem Iron Co. (C.C.A. 3), 88 Fed. 23, 30.....	59
Young v. P. E. Ry. Co., 208 Cal. 568, 577, 283 P. 61.....	21n
Young v. S. P. Co., 182 Cal. 369, 190 P. 36, 189 Cal. 746, 210 P. 259.....	27, 28, 39, 49, 50n, 63
Zibble v. S. P. Co., 160 Cal. 237, 116 P. 513.....	24, 30, 39

STATUTES, TEXTS, ETC.

Cal. Veh. Cod. §352(b).....	4n, 13, 39, 40, 41
28 U.S.C.A. §71.....	7
28 U.S.C.A. §1291.....	7
28 U.S.C.A. §1294.....	7
28 U.S.C.A. §2107.....	7
Fed. Rules of Civ. Proc., Rule 73.....	7
25 R.C.L., p. 1285.....	51

100

101

102

103

104

105

106

107

108

109

110

111

112

113

114

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IN THE
United States
Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and through their Guardian ad Litem, JOSEPHINE SOUZA, JOSEPHINE SOUZA, individually, and MARY ADELE SOUZA and GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD SOUZA, Minors, by and through their Guardian ad Litem, H. G. EASTMAN,

Appellees.

Appellant's Opening Brief

I.

PLEADINGS, PROCEEDINGS AND JURISDICTION

About 9:02 A.M. on October 11, 1945, at the intersection of Beckwith Road and the main line track of Southern

Pacific Company, Stanislaus County, California, an "un-guarded" grade crossing two miles or more north of Modesto, a Southern Pacific Company light engine, No. 2478¹ running north (railroad west) as train 2/59, struck a Ford Coupe automobile which was going east (see pleadings, R. 4, 5, 8, 9, 14, 15, 18, 24 and 28). The Ford Coupe was owned and operated by John Martin Souza, a minor (R. 7, 75, 98). Riding with him were his father, Antonio Azevedo Souza, and his brother, Edward A. Souza. Antonio and Edward were killed. John was slightly injured. The automobile was demolished. E. S. Glanville was the engineer, and H. J. Johnston was the fireman of the locomotive (see pleadings R. 4, 5, 8, 9, 15, 17, 18, 24, 28, and R. 98-100, 218-219, and 421). Engineer Glanville died before the trial (R. 41, 42, 46, 53, 55, 84, 85, 228).

On August 12, 1946 three actions were commenced in the Superior Court of the State of California in and for the City and County of San Francisco, No. 356,358 by Josephine Souza and the surviving Souza children for \$151,157.38 damages on account of the death of the husband and father, Antonio, No. 356,359 by John Martin Souza (by his guardian *ad litem*) for \$15,650.00 damages for injuries to himself and damage to his automobile, and No. 356,360 by Geraldine Souza, the wife of, and by the children of, Edward (by their guardian *ad litem*) for \$151,129.38 damages on account of the death of Edward. In each action the defendants named were Southern

1. This is the number given in the pleadings. This is incorrect. The number was 2487 (R. 91, 92). Nothing turns on the number.

Pacific Company, Glanville, the engineer, and Johnston,² the fireman. The charges were the same in each complaint and were that "said defendants, and each of them, so carelessly and negligently operated and propelled defendants' locomotive, as aforesaid, as to cause said engine to collide with the automobile" driven by John and in which Antonio and Edward were riding (R. 5, 9, 15) (Complaints R. 2-17).

Defendants Southern Pacific Company and Glanville appeared and answered in each action (R. 17-32), admitted the accident, denied all charges of negligence (R. 19, 25, 29) and set up various separate defenses: Contributory negligence of each occupant of the Ford Coupe, that the negligence of the driver, John Martin Souza, was the sole proximate cause of the accident, and that John Martin Souza was guilty of negligence which was a proximate cause of the accident and that this negligence was imputable to his father and brother because all were engaged in a joint undertaking and venture (R. 21, 31) and John was their agent (R. 22, 32) and to the father on the additional ground that John was a minor, driving with the father's consent³ and California Vehicle Code

2. Although plaintiffs served Johnston with summons and complaint and took his deposition, they elected not to proceed against him. He never appeared and plaintiffs dismissed as to him (R. 200 et seq.).

3. The facts, that John was a minor and was driving with his father's consent (the father was in the coupe) appear from the pleadings and were conceded in the plaintiffs' opening statement (R. 77).

§352(b)⁴ applied.^{5 6}

By stipulation of April 1, 1947, and order of April 10, 1947, the three actions were "consolidated into one action" entitled John Martin Souza, et al., Plaintiffs, vs. Southern Pacific Company, et al., Defendants, No. 356,358, Consolidated Cause (R. 33, 34).

The Consolidated Cause came on for trial on April 19, 1948 before the Superior Court of the State of California in and for the City and County of San Francisco, and the

4. Cal. Veh. Code §352(b) provides: "Any negligence or wilful misconduct of a minor whether licensed or not under this code in driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor shall be imputed to such parents or such person or guardian for all purposes of civil damages, and such parents or such person or guardian shall be jointly and severally liable with such minor for any damages proximately resulting from such negligence or wilful misconduct."

5. *Milgate v. Wraith*, 19 C.2d 297, 121 P. 2d 10; *Rawlins v. Lory*, 44 C.A.2d 20, 111 P.2d 973; *Solloway v. Watts*, 58 C.A.2d 595, 137 P.2d 477; *Grover v. Sharp etc. Co.*, 66 C.A.2d 736, 153 P.2d 83 (hr. den.).

6. Cal. Veh. Code §352(b) imputes negligence to the parent for all purposes so that the negligence of the minor will be a defense to an action brought on behalf of the parent or for the parent's death. This was recognized in *Solloway v. Watts*, supra, at page 597 where the court said: "The imputation of negligence to a parent is not limited to actions of third persons against the parent but it extends to actions in which the parent seeks redress and damages. The imputation extends to all cases where the rights and obligations of parents are invoked in civil actions for damages. Such was the holding in *Milgate v. Wraith*, 19 Cal. 2d 297 [121 P.2d 10], where the negligence of a person using an automobile with permission of the owner was involved and where under a code provision similar to the one above quoted the obligations of the owner were determined." See also *Milgate v. Wraith*, so construing the identical language used in §402 of the Vehicle Code.

fact of death of defendant E. S. Glanville was suggested to the court, whereupon the plaintiffs, by their counsel, announced themselves as ready for trial without having had summons and complaint in said consolidated cause, or any of the three actions thereof, served upon defendant H. J. Johnston or any of the defendants sued by fictitious names and without continuing the cause for the service of summons and complaint on any of said defendants. By so announcing themselves as ready for trial, plaintiffs thereby voluntarily elected to proceed with the action against defendant Southern Pacific Company alone, and such election amounted to a complete severance of the action as to the non-resident Southern Pacific Company, and there existed in said action a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company. Upon the announcement by plaintiffs to proceed with the trial, said action, which prior to and up to the time of said announcement had not been removable to a United States District Court, thereupon and for the first time became removable to the proper United States District Court. Appellant Southern Pacific Company thereupon filed its verified petition for removal of the action to the District Court of the United States in and for the Northern District of California, Southern Division and duly made and filed with said petition its bond (R. 35-45). Prior to filing said petition appellant gave notice thereof, and after the filing of said petition and bond they were duly presented to the Superior Court, and the court having considered the same, made its order accepting the bond as good and sufficient and ordered that the consolidated cause be removed to the District Court of the United States in and for the Northern District of California, Southern Division (R. 46-47).

On May 3, 1948, appellant, Southern Pacific Company filed the certified copy of the record on removal from the Superior Court of the State of California in and for the City and County of San Francisco with the Clerk of the District Court of the United States for the Northern District of California, Southern Division, and said consolidated cause was thereupon designated as No. 28040-R in the records of the District Court (R. 2).

On May 24, 1948 plaintiffs, pursuant to notice of motion therefor, made a motion to remand the consolidated cause to the Superior Court of the State of California in and for the City and County of San Francisco on the grounds stated in its written notice of motion to remand (R. 48-54). Plaintiffs' motion to remand was denied by a written order dated June 28, 1948 (R. 55).

The consolidated cause was tried July 20-23, 1948 (R. 56, 57, 73, 403), a motion for a directed verdict in favor of defendant and appellant Southern Pacific Company was made (R. 359-360) and denied (R. 360), and a verdict of \$1150 in favor of John Martin Souza, the driver,⁷ \$31,047.38 for the death of Edward A. Souza,⁸ and \$16,157.38 for the death of Antonio A. Souza⁹ was returned against appellant. Judgment was entered on the verdict for appellees and against appellant on July 26, 1948 (R. 57).

Appellant, on July 31, 1948, served and filed its notice of motion for judgment notwithstanding the verdict and for new trial (R. 59-63). The motions were denied on

7. For injury to him and damage to the Ford Coupe.

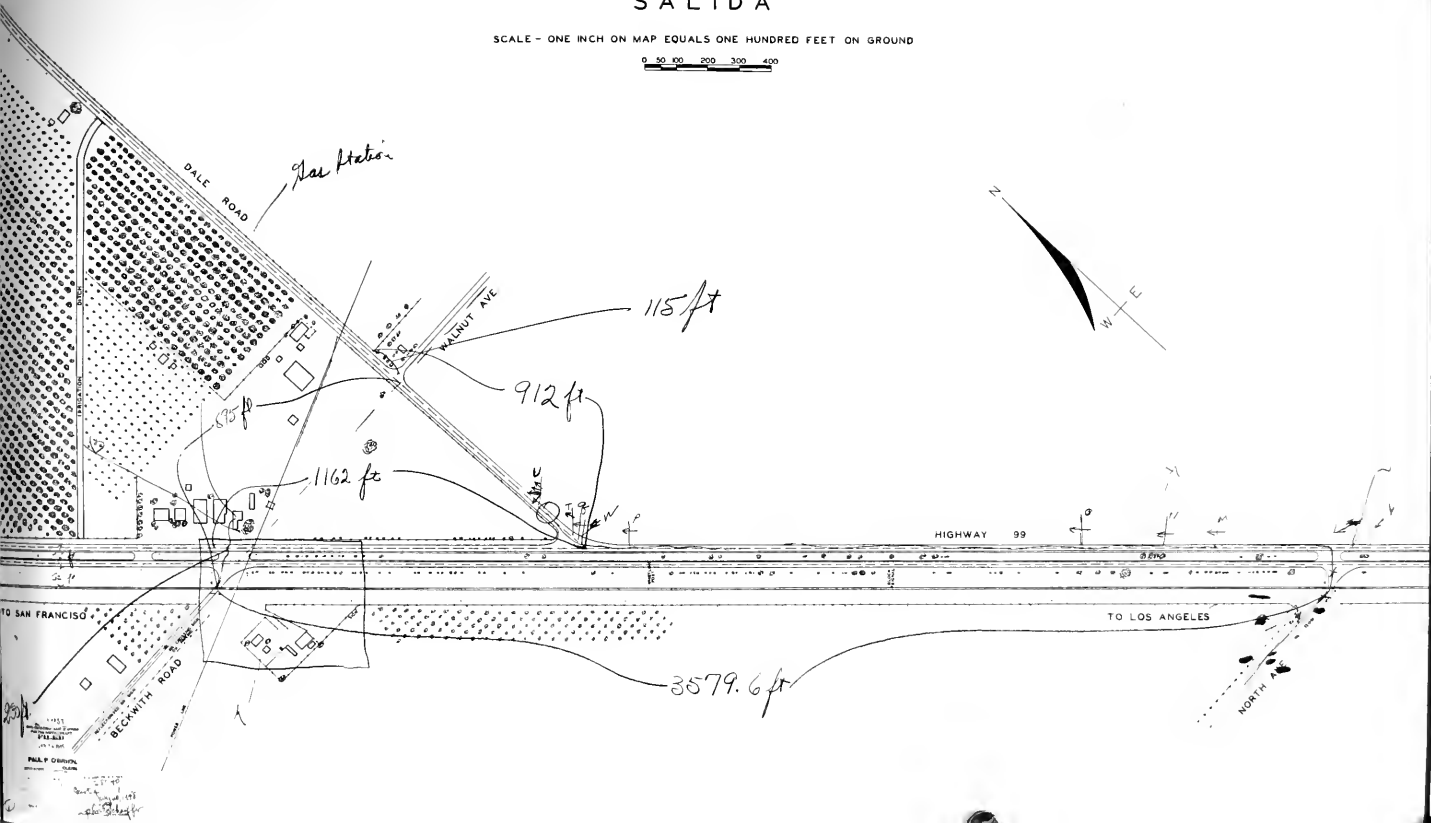
8. The son and brother. In favor of his widow and children.

9. The father. In favor of his widow and children, including the driver John.

SALIDA

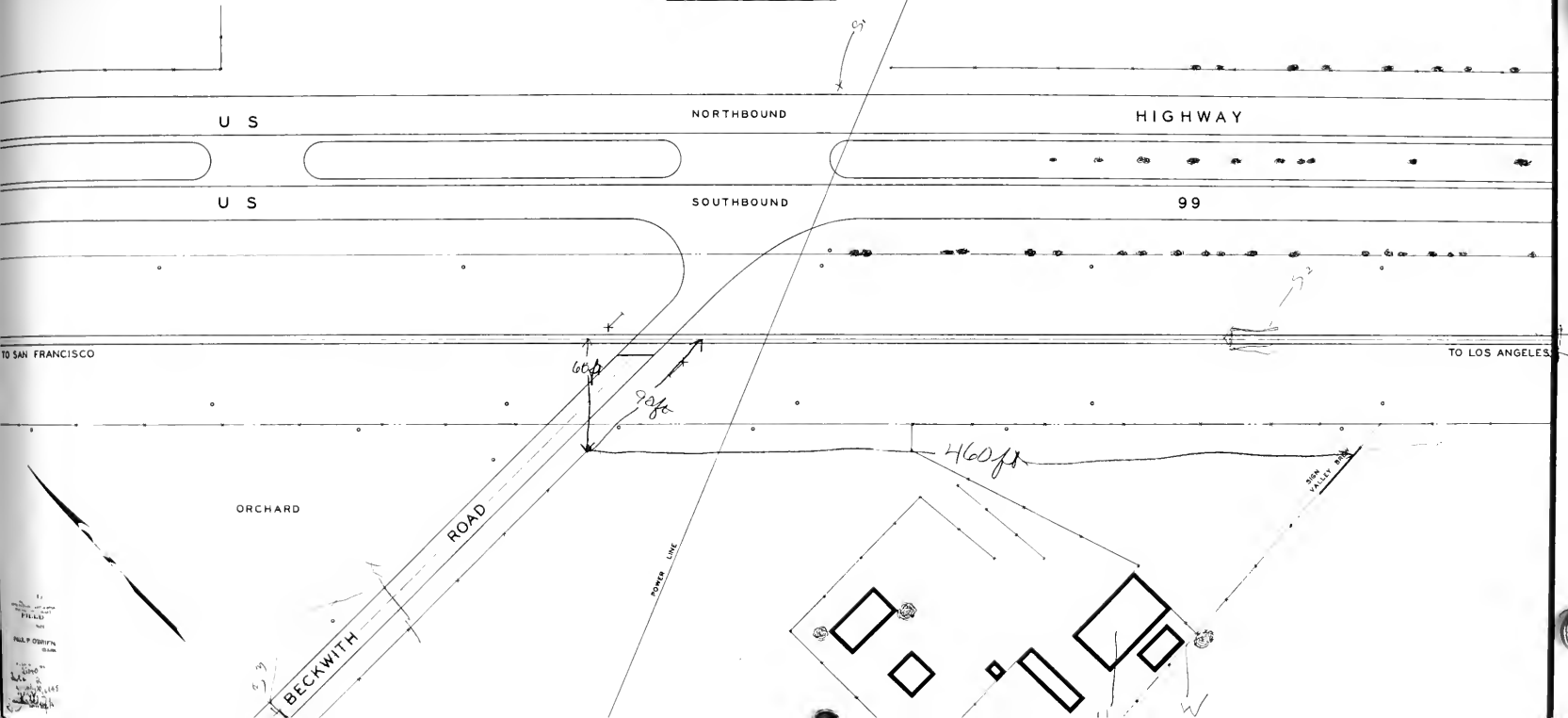
SCALE - ONE INCH ON MAP EQUALS ONE HUNDRED FEET ON GROUND

0 50 100 200 300 400



SALIDA

SCALE-ONE INCH ON MAP EQUALS TWENTY FEET ON GROUND



September 22, 1948 (R. 66). On October 21, 1948 appellant filed its notice of appeal and designation of record (R. 70) and its bond was approved and filed.

The jurisdiction of the District Court is based on 28 U.S.C.A. §71, as in effect as amended. The jurisdiction of this Court is sustained by 28 U.S.C.A. §1291, §1294, §2107 and the Federal Rules of Civil Procedure, Rule 73.

II.

STATEMENT OF THE CASE

North of Modesto, the Southern Pacific private right of way runs generally northwesterly parallel to and west of Highway 99, which is a divided highway at that point. About two miles north of Modesto, a local two lane county road, Beckwith Road, comes into Highway 99 from the northwest at an angle of approximately 45° and immediately before joining Highway 99 crosses the Southern Pacific right of way and the single main line track parallel to Highway 99.

The crossing is a typical open country railroad crossing at grade. There were the usual standard crossbuck warning signs. A conception of the locality, position of the road, the railroad tracks, Highway 99, location of fixed objects and the like can best be had from two diagrams, Court's Exhibits 1 and 2.¹⁰ These diagrams are reproduced herein for convenience of the Court. In reproducing them, a reduction in size was made. Various dimensions, however, are shown on the diagrams. In addition, distances can be scaled from the diagrams, for though the

10. Introduced as the Court's Exhibits 1 and 2 on Defendant's opening statement (R. 89, 90). They were prepared by an engineer from a survey and are accurately drawn to scale.

scale on the Exhibits will not apply, the graphic scales upon each diagram were, of course, reduced proportionately, and in the same ratio as the diagram as a whole.

Beckwith Road, at the point of the accident is perfectly straight as it approaches the crossing. Although straight, it does not intersect the tracks at a right angle, but the angle of approach favors the driver's view down the tracks in the direction from which the locomotive was coming. On the approach to the crossing along Beckwith Road, as indicated on the diagrams, there are a reflectorized advance warning sign off the road and a railroad crossing warning sign painted on the pavement (Court's Exhibit 1, R. 122, Def's Ex. A, B).

The view of the driver approaching this track is demonstrated by the pictures in evidence. Defendant's Exhibit I is here reproduced showing the view down the tracks in the direction from which the locomotive was coming.^{10a} From a point 60 feet from the tracks on the perpendicular (during which an automobile must travel 90 feet)¹¹ the view down the tracks is open and free both ways. Farther back there is a low row of grape vines, but there was no evidence and there was no claim that they interfered with the view at the eye level of a driver of an automobile. A train is clearly seen in the photograph reproduced here.

10a. The photograph reproduced here is Defendant's Exhibit I taken on Beckwith Road, 75 feet west of the tracks and looking in the direction from which the engine was coming (R. 128-129). It shows the driver's view at that point.

11. See Court's Exhibit 2. Since the road approaches the track at an angle the distance along the road to the track (90 ft.) is more than the perpendicular distance (60 ft.). The Souza automobile travelled the greater distance (90 ft.) with a clear, unobstructed view.



RAILROAD
CROSSING

There was nothing to prevent its being seen, if one looked, from Beckwith Road.

All three occupants of the Souza automobile were familiar with Beckwith Road and its approach to and the railroad crossing.¹² They all lived on a ranch northwest of Modesto, about three miles from the crossing (R. 81, 98, 99).

John Souza, the driver, was 19 at the time of the accident (R. 98). He had acquired the 1941 Ford Coupe, which he was driving at the time of the accident, about seven months before but had neither a driver's license nor an instruction permit at the time of the accident (R. 116-117). This was known to his father and brother Edward (R. 117).

At the time of the accident John and his father and brother Edward were going to look at a ranch (R. 100) which John had seen advertised (R. 118), and which was thought suitable to stock with beef and in regard to which John wanted their help, advice and approval (R. 101, 118, 119, 120, 121, 122). They were talking over the ranch on the way to it just before the accident (but not at the time of the accident). All three were in the front seat, John was driving, his brother Edward sat in the middle and his father sat on the extreme right (R. 100). The father's consent to his minor son's driving was not disputed.¹³

12. There never was an issue on this. Plaintiffs' attorney conceded in his opening statement that "*** young Mr. Souza was very familiar with this particular crossing. ***" (R. 81).

13. The father was riding with his son. Plaintiffs' opening statement concedes that the Vehicle Code imputes negligence, if any, to the person allowing him to drive "so in that situation, from the standpoint of Mrs. Josephine Souza and the standpoint of her children, that is, the minor children, as well as the adult children, and from the standpoint of John Martin Souza, the same law applies" (R. 77).

John testified that he drove along Beckwith Road about 35 to 40 miles per hour but slowed down about 100 to 200 feet from the crossing (R. 102). At 60 feet from the tracks, with no obstruction to his view, he says he was going about 15 miles per hour (R. 103). He testified that he stopped about 20 feet from the crossing (R. 103), looked both ways and didn't look again to his right until he was on the tracks at which time he saw a locomotive 50 to 75 feet away (R. 104). There was evidence that he didn't stop before crossing the tracks (R. 334, 335).

John testified he heard no whistle or bell or noise of the engine before seeing it (R. 109). The window of the car on the right hand side was rolled up. There was evidence that the whistle and bell were sounded and evidence that they were not. There was no evidence that the train made no noise. On the contrary, the attention of two independent witnesses, across the highway, was attracted to the engine before the accident by noise it was making as it came down the tracks (R. 333, 334, 330, 349, 323). One of them described it as rattling of wheels and side rod plunger pounding (R. 333, 349). John didn't even hear the engine when he was on the tracks when he looked up to see the engine only 50-75 feet away (R. 111).

John claimed that he could see only 600 feet down the track (R. 104), because of a haze or mist. The sun was up, had been up for from three to four hours. There was testimony that it was a clear day. One of plaintiff's witnesses testified that he saw the accident from a point at least 1,162 feet away¹⁴ and saw the engine continue on an addi-

14. Witness Oran Davis testified he was at the intersection of Dale Road and Highway 99 when he saw the automobile

tional 1,000 feet farther from him, so that his range of visibility was no less than 2,162 feet (R. 169, 170, 186, 187).

The engine involved was a passenger engine, running light or without cars. The front of the locomotive had been painted a silver color (Plaintiff's Exhibit 10, R. 428-429) as an added precaution for motorists to make it visible at a greater distance. Its speed was estimated by eye witnesses at 25 to 40 and at 60 miles per hour. The highest speed attributed to it, by one of plaintiff's witnesses, was 65 to 70 miles per hour.

In the collision, John received minor injuries, his father was instantly killed, and his brother Edward received injuries from which he later died.

III.

SUMMARY OF POINTS TO BE DISCUSSED

We propose to argue:

1. Under the evidence, John Souza, the driver, was guilty of contributory negligence as matter of law, in driving his automobile onto the railroad tracks in plain view of an approaching locomotive, which on his testimony could have been seen by him for the last 600 feet of its approach, but was not seen by him until it was 50 to 75 feet from him. The court erred in submitting John's case to the jury.

2. The negligence of John Souza, the driver, is imputed as matter of law to his father by reason of §352(b) of the Vehicle Code of the State of California. The court erred in submitting the father's case to the jury. Even if

approaching the crossing and saw the locomotive. The distance along Highway 99 from Dale Road to Beckwith Road was measured at 1162 feet (R. 274-275). It would be further to the scene of the accident.

we are wrong in this it still remains the court erred in the manner in which this issue was submitted to the jury, in permitting the jury to determine as a fact whether the Vehicle Code applied to this case. It applied as a matter of law and the preliminary question of fact submitted to the jury was not in dispute.

3. There was evidence from which the jury could have found that all three occupants of the automobile were engaged in a joint venture and the court erred in refusing to submit that issue and the question of agency as between them to the jury.

4. The court erred in the granting of certain of plaintiffs' instructions and in the refusal of certain of defendant's instructions and by doing so the jury was not properly instructed, to the prejudice of appellant, as to the issues which were submitted to the jury.

5. The court erred in denying appellant's motions after judgment.

IV.

SPECIFICATION OF ERRORS

1. The court erred in denying appellant's motion for a directed verdict as to the case of and complaint on behalf of John Martin Souza (R. 359, 360).

2. The court erred in denying appellant's motion for a judgment notwithstanding the verdict as to the case of and complaint on behalf of John Martin Souza (R. 59-61, 66).

3. The court erred in denying appellant's motion for a directed verdict as to the case of and complaint on behalf of the death of Antonio Azevedo Souza (R. 359, 360).

4. The court erred in denying appellant's motion for a judgment notwithstanding the verdict as to the case of

and complaint on behalf of the death of Antonio Azevedo Souza (R. 59-61, 66).

The court erred in its charge to the jury as follows:

5. "I respectfully object to the modification of defendant's proposed instruction No. 37, which left to the jury the question of the consent of the father to the driver of the automobile as a matter of fact, instead of instructing that that is a matter of law" (R. 397). Defendant's proposed instruction No. 37 is as follows:

"Defense Instruction No. 37

By Section 352(b) of the California Vehicle Code, in effect at the time of this accident, it is provided that any negligence of a minor, whether licensed or not under that code in driving a motor vehicle upon a highway with the express or implied permission of his parents, shall be imputed to such parents for all purposes of civil damages. Accordingly, if in this case there was any negligence on the part of the driver, John Martin Souza, which was a proximate cause of the accident and death of his father Antonio Azevedo Souza, such negligence is to be imputed to the father with the same effect as though the father himself had been guilty of negligence." (R. 446, 447)

The Court charged: "By Section 352(b) of the California Vehicle Code, in effect at the time of this accident, it is provided that any negligence of a minor whether licensed or not under that code in driving a motor vehicle upon a highway with the express or implied permission of his parents shall be imputed to such parents for all purposes of civil damages. Accordingly, if you find from a preponderance of the evidence that John Martin Souza,

a minor, drove the automobile with the permission, express or implied, of his parents and that there was negligence on his part which was a proximate cause of the accident and of the death of his father, Antonio Azevedo Souza, such negligence is to be imputed to the father with the same effect as though the father himself had been guilty of negligence" (R. 386, 387).

6. "I respectfully except to the giving of Plaintiff's Proposed Instruction No. 9, in substance and in effect stating to the jury that the plaintiffs were entitled to anticipate that the defendant would exercise care in the operation of its locomotive, and in connection with that I respectfully object and except to the denial of the Defense Proposed Instruction No. 27, which would have told the jury that the operators of the train were entitled to assume that any traveler traveling upon the highway would perform duties that the laws of the State impose upon him" (R. 397, 398). The Plaintiff's Proposed Instruction No. 9 was read by the court as follows:

"You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution, as required by law." (R. 380)

Defendant's Proposed Instruction No. 27 is as follows:

"Defense Instruction No. 27

In considering the conduct of those in charge of the railroad locomotive and in passing on the claim that defendant was guilty of negligence in operating and

propelling it, you will bear in mind that the engine-man, until put on notice to the contrary, had the right to assume and presume that any person operating an automobile toward or onto the railroad track would perform the duty which the law of this State imposes upon the driver of such an automobile and, in the reasonable exercise of his faculties of observation and caution, would not attempt to cross the track in dangerous proximity to an approaching railroad locomotive if the same were plainly open to view so that collision with the locomotive could be avoided if the automobile driver exercised reasonable care and complied with the duties imposed upon him by law. Accordingly, in considering this case, you must consider the duties which the law imposed upon John Martin Souza, the driver of the automobile, in the operation of that automobile, as he approached the railroad track, not only from the point of view of determining whether there was any negligence on his part, but also from the point of view of the bearing which the duties he was required to perform, and which in the absence of notice to the contrary the enginemen were entitled to assume he would perform, may have on the claim of negligence on the part of defendant." (R. 445, 446)

7. "We respectfully object and except to the failure to submit the question of joint enterprise to the jury as a question of fact, and the question of agency as a question of fact as between the two brothers" (R. 398). Defendant requested instructions as follows:

"Defense Instruction No. 38

If you find that at the time of this accident John Martin Souza and his brother, Edward Anthony

Souza, in the use and operation of the automobile were engaged in a joint venture or enterprise, and in the use of the automobile were engaged in a common undertaking in which they had a community of interest and in respect of which each exercised or had the right to exercise an equal or joint control and direction and there was, in the use of the automobile, a mutual agency such that the driver, although he was the owner of the automobile, was operating it not alone for his own benefit, but as well for the benefit of his brother and as his agent, then, any negligence on the part of the brother John Martin Souza, who was driving the automobile, is to be imputed to the deceased brother Edward Anthony Souza with the same legal effect as though the deceased brother himself had been guilty of negligence" (R. 447).

"Defense Instruction No. 39

Even if you should find that the father, Antonio Azevedo Souza, was not himself negligent or that the deceased brother, Edward Anthony Souza, was not himself negligent, still, if the brother and son who was driving, John Martin Souza, was guilty of contributory negligence in the operation of the automobile and under the facts of the case and the instructions, his negligence is to be imputed to either the deceased father or the deceased brother there can be no recovery on account of the death of the person to whom such negligence is to be imputed and the negligence of the driver will have the same legal effect to bar any recovery for death as though the person to whom such negligence is imputed had himself been guilty of contributory negligence" (R. 447, 448).

8. "We respectfully object and except to the failure to give Defense Proposed Instruction No. 56, which would have told the jury that if the circumstances were such that the plaintiff must have seen, the driver must have seen an approaching locomotive—

[The court interrupted, followed by discussion.]

* * * * *

We object and except to the failure to give Defendant's Proposed Instruction No. 56 which would have told them if the approach of the locomotive could have been learned, he did not look or failed to and crossed in front of it" (R. 398, 399). Said requested instruction No. 56 is as follows:

"Defense Instruction No. 56

If the driver of the automobile, on the occasion of the accident complained of, and in view of the physical facts then existing at the scene of the accident, had he exercised ordinary care, must have learned of the approach of the locomotive in time to have avoided collision with it, by using ordinary care, then the very fact that the automobile collided with the engine raises a presumption that he did not take the required precautions and did not look or listen (*Loftus v. Ry.*, 166 Cal. 464; *Koster v. S. P.*, 207 Cal. 753), or that, having looked and listened, he endeavored to cross immediately in front of the approaching train, and in either of such events, if so you find, his conduct would constitute negligence proximately contributing to the accident" (R. 448).

9. "We respectfully except and object to the failure to give Defense Proposed Instruction No. 58, which in substance and effect states that if the circumstances were

such that the driver, by looking, must have seen the locomotive in time to have avoided it, any testimony that he looked and did not see may be disregarded by the jury” (R. 400). Said instruction No. 58 is as follows:

“Defense Instruction No. 58

Neither the court nor the jury is bound by the mere declaration of a witness, no matter how improbable, incredible, or impossible that declaration may be. The court or jury is only bound by swearing credibility [credibly], that is to say, credible swearing is all that is to conclude either the court or the jury in its judgment. It is not enough for a witness to say that he looked with unseeing eyes or listened with unhearing ears. If the established facts and conditions, including the physical surroundings at the scene of the accident, were such that before the accident, and before leaving a place of safety, the driver John Martin Souza, if he had looked in the direction from which the locomotive came, must have seen it in time to have avoided being struck by it, by exercise of reasonable care, and must have seen it while he was in a place of safety, then I instruct you that any testimony, if such there has been, that in such circumstances he did look, but did not see the locomotive, may be disregarded by you” (R. 449).

10. “We respectfully except and object to the failure to give Defense Proposed Instruction No. 58-A, which would have told the jury the mere fact that two other persons were in the car did not relieve them or any of them from the duty of exercising ordinary care” (R. 400). Said Proposed Instruction No. 58-A is as follows:

“Defense Instruction No. 58-A

The mere fact that Antonio Azevedo Souza and Edward Anthony Souza were not physically driving and operating the automobile did not relieve them or either of them from the duty of exercising reasonable care in respect of the operation of the automobile, and each as to his own safety. To the contrary, each was at all times under a duty to exercise such care” (R. 449, 450).

V.

ARGUMENT

A. The Rights and Duties of the Railroad and Highway Traveler at a Grade Crossing Are Settled and Rules Fixing Standard of Care Required of Highway Traveler Are Established as Matter of Law.

The California courts have repeatedly recognized that steam railroad grade crossing accidents belong to a class “of cases which have appeared so frequently that a definite standard of care required in particular circumstances has been laid down by the courts, and in each of such classes there has been developed a rule and failure to comply with such standard is, as matter of law, negligence. Thus, it is well settled that the ‘railroad track of a steam railroad must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains’.” (*Hamlin v. P. E. Ry. Co.*, 150 Cal. 776, 778, 89 P. 1109.¹⁵)

15. For other cases recognizing that the rules for steam railroad crossings have been crystallized and standardized see: *Herbert v. S. P. Co.*, 121 Cal. 227, 53 P. 651; *Scott v. San Bernardino etc. Co.*, 152 Cal. 604, 93 P. 677; *Green v. L. A. etc. Ry. Co.*, 143 Cal. 31, 35, 76 P. 719; *Calif. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 76, 269 P. 922; *Koster v. S. P. Co.*, 207 Cal. 753, 766, 279 P. 788.

That the steam railroad cases belong to a particular class in which the rules have been crystallized and standardized is shown by those cases which have recognized and applied the distinction between such cases and street car cases where an interurban line was involved and have cited the railroad cases to the point that in the steam railroad case the traveler must exercise greater vigilance and is held to stricter accountability and the railroad has greater privilege of through and continuous motion than is the case with street car traffic (*Lund v. P. E. Ry. Co.*, 25 Cal. 2d 287, 153 P.2d 705¹⁶; *Hamlin v. P. E. Ry. Co.*,¹⁷ above; *Kramm v. Stockton etc. Co.*, 3 Cal. App. 606, 614, 86 P. 738 (hr. den.);¹⁸ *Riney v. P. E. Ry. Co.*, 45 Cal. App. 145, 148, 187 P. 50).

The railroad has the right of way. It is the duty of the traveler to "stop and look and listen for such approach-

16. This case is typical of the type of case in which this question is most frequently discussed. It was the case of an interurban electric car. In such cases the courts frequently have had occasion to notice that the applicable rules, where operation is in the open country or on a private right of way in the city, are those of the steam railroad cases. Some of these cases are cited in the *Lund Case*. See in addition *N. Y. etc. Co. v. U. R. R.*, 191 Cal. 96, 100, 215 P. 72; *L. A. T. Co. v. Conneally*, 136 Fed. 104 (C.C.A. 9); *Rowe v. So. Cal. Ry. Co.*, 4 Cal. App. 1, 5, 87 P. 220; *Billig v. S. P. Co.*, 192 Cal. 357, 362, 219 P. 992; *Calif. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 76, 269 P. 922; *Runnels v. U. R. R.*, 175 Cal. 528, 531, 166 P. 18 (noticing particularly that the street car rules are not as strict as the steam railroad rules); *Babcock v. P. G. & E. Co.*, 120 Cal. App. 218, 224, 7 P.2d 736 (hr. den.). This listing is not exhaustive.

17. Street cars and steam railroads differ "materially."

18. It was said that "the courts recognize a distinction between cases of injuries by street railroads and cases of injuries by 'ordinary steam railroads'" and that "the question of what is ordinary prudence is widely different in the two cases."

ing trains or cars, and to yield the right-of-way to such cars or trains." (*Billig v. S. P. Co.*, 192 Cal. 357, 219 P. 992; *Koster v. S. P. Co.*, 207 Cal. 753, 762, 279 P. 788; *Green v. L. A. etc. Ry. Co.*, 143 Cal. 31, 46, 76 P. 719;¹⁹ *N. Y. etc. Co. v. U. R. R.*, 191 Cal. 96, 215 P. 72).

"The railroad track of a steam railroad must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for the approaching train." (*Herbert v. S. P. Co.*, 121 Cal. 227, 53 P. 651.²⁰) The track "is itself a warning * * * that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance" (*Holmes v. S. P. etc. Co.*, 97 Cal. 161, 31 P. 834²¹). In a case where the traveler was crossing a series of tracks Judge Wilbur said:

"The railroad track itself is a sign of danger to be heeded at the peril of the traveler on the intersecting

19. This is a pedestrian case. Some of this language is quoted above at pp. 21 et seq. It was stated that the rule laid down and approved by the authorities is "that it is the duty of the highway traveler to stop and allow the train to pass."

20. The court adds that "if, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." And cf. *Levin v. Brown*, 81 C.A. 2d 913, 185 P.2d 329.

21. The following are a few of the legion of cases for this proposition: *Green v. S. P. Co.*, 132 Cal. 254, 259, 64 P. 255; *Young v. P. E. Ry. Co.*, 208 Cal. 568, 577, 283 P. 61; *Parker v. S. P. Co.*, 204 Cal. 609, 269 P. 622; *Koster v. S. P. Co.*, 207 Cal. 753, 764, 279 P. 788; *Hutson v. So. Cal. Ry. Co.*, 150 Cal. 701, 89 P. 1093; *Loftus v. P. E. Ry. Co.*, 166 Cal. 464, 137 P. 34; *Crissinger v. S. P. Co.*, 169 Cal. 619, 149 P. 175; *Griffin v. S. P. etc. Co.*, 170 Cal. 772, 151 P. 282.

highway. This rule is applicable to each track. * * *
 The railroad track was as much a warning sign as the crossing sign or wig-wag, and as readily visible to one advancing slowly toward the track * * *.”

S. P. Co. v. Day, 38 F.2d 958 (C.C.A. 9).

In *Koster v. Southern Pacific Company*, 207 Cal. 753, 279 P. 788, the Supreme Court of the State of California made it clear that California courts were in exact accord with the rule laid down by Mr. Justice Holmes of the United States Supreme Court in *Baltimore & Ohio Railway v. Goodman*, 275 U.S. 66, 72 L.Ed. 167, 48 Sup. Ct. Rep. 24. The opinion of the *Koster* case sets forth that portion of Justice Holmes’ opinion that is the classic statement of the stop, look and listen rule. Beginning at page 762 (page 792, 279 P.), the court states:

“The rule prescribing the quantum of caution that should be observed by persons crossing railroad tracks has been many times stated by this court without material deviation from the standard laid down in the case last above cited, written by Mr. Justice Holmes of the United States Supreme Court. The principle of law which governs that case is, in some respects, peculiarly applicable to the instant case. It is there said:

“ ‘Goodman was driving an automobile truck in an easterly direction and was killed by a train running southwesterly across the road at a rate of not less than 60 miles an hour. The line was straight, but it is said by the respondent that Goodman “had no practical view” beyond a section house 243 feet north of the crossing until he was about 20 feet from the first rail, or, as the respondent argues, 12 feet from danger, and that then the engine was still

obscured by the section house. He had been driving at the rate of 10 or 12 miles an hour, but had cut down his rate to 5 or 6 miles at about 40 feet from the crossing. It is thought that there was an emergency in which, so far as appears, Goodman did all that he could.

“ ‘We do not go into further details as to Goodman’s precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true, as said in *Flannelly v. Delaware & H. Co.*, 225 U.S. 597, 603 [44 L.R.A. (N.S.) 154, 56 L.Ed. 1221, 1222, 32 Sup. Ct. Rep. 783], that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts. See *Southern P. Co. v. Berkshire*, 254 U.S. 415, 419 [65 L.Ed. 335, 337, 338, 41 Sup. Ct. Rep. 162]’.”

One sentence of Justice Holmes' opinion is of particular importance here:

“ ‘It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk’.”

Nor have the cases left it indefinite as to what must be done by way of looking and listening. The rule for the traveler is that “the imperative duty is cast upon him to listen carefully and to look carefully at the most available and convenient distance from the track from which an observation of it can be made, and when the act of listening and looking may be reasonably effective” (*Martin v. S. P. Co.*, 150 Cal. 124, 88 P. 701). If he does not look, or looks heedlessly, he is negligent (*California Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 269 P. 922). He is negligent if it can be said of him that he “looked with unseeing eyes and listened with unhearing ears” (*Zibble v. S. P. Co.*, 160 Cal. 237, 116 P. 513).

The duty is “to look for approaching cars at such point and in such manner as would enable him to determine if he could proceed in safety” (*Cal. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 269 P. 922). To this end, the place selected for looking must be one where looking is effective (*Green v. So. Cal. Ry. Co.*, 138 Cal. 1, 70 P. 926; *Green v. L. A. etc. Ry. Co.*, 143 Cal. 31, 76 P. 719; *Pacheco v. S. P. Co.*, 129 Cal. App. 610, 19 P.2d 251, (holding that stopping for an arterial stop sign at a point where the traveler cannot see does not satisfy the railroad crossing rule)).

“It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains. He should stop for the purpose of making

such observation when necessary. It is his duty to use all of his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * Stopping 35 feet from the crossing and trusting to his sense of hearing, when he might have obtained a clear view of the track by moving 18 feet and a few inches nearer, clearly indicates negligence. * * * A person approaching a railway track which is itself a warning of danger must take advantage of every reasonable opportunity to look and listen."

Griffin v. San Pedro etc. R. R. Co., 170 Cal. 772, 151 P. 282.

Looking at a point remote in time and place from the attempt to cross the track will not do. The Court in *Green v. L. A. etc. Co.*, 143 Cal. 31, 76 P. 719, used the following language in pointing out the reason for this:

"If risk is inherent in a continuing state of things, the duty to exercise reasonable care is a continuing obligation. This at least must be true, that a man is negligent who attempts to drive across a railroad line after listening and looking only once toward a quarter from which a train may approach, if these acts of attention and observation are performed when the observer is so far from the crossing that before he will reach it a train coming from that quarter, and open to his further attention and observation, has time to advance so as to endanger him. * * * The defect was that, though he exercised care at first, he did not continue to be careful, but became inattentive to his surroundings before he reached a place of safety. * * *

"It is equally clear, on principle and authority, that this duty must be performed at such time and

place, with reference to the particular situation in each case, as will enable the traveler to accomplish the purpose the law has in view in its imposition upon him. He must stop so near to the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened, and his attempt to proceed across the tracks.”

The danger being one from a moving train, the traveler must “take advantage of every reasonable opportunity to look and listen” (*Chrissinger v. S. P. Co.*, 169 Cal. 619, 149 P. 175). “In fact, the law requires a person to keep looking where they are crossing a railroad track” (*Griswold v. Ry. Co.*, 45 Cal. App. 81, 187 P. 65). “The duty is constant because the danger is incessant” (*Robinson v. Oregon-W. etc. Co.*, 90 Ore. 490, 176, P. 594. Compare, also, the *Herbert Case*, and *Riney v. Ry. Co.*, 45 Cal. App. 145, 187 P. 50; *Vilhauer v. P. E. Ry. Co.*, 118 Cal. App. 240, 4 P.2d 960).

Looking at a remote point, particularly where at a nearer point an unobstructed view can be had, will not satisfy the rule.

Pacheco v. S. P. Co., 129 Cal. App. 610, 19 P.2d 251;

Green v. Ry. Co., 138 Cal. 1, 70 P. 926;

Green v. Ry. Co., 143 Cal. 31, 76 P. 719;

Calif. Rendering Co. v. P. E. Ry. Co., 205 Cal. 73, 269 P. 922;

Koster v. S. P. Co., 207 Cal. 753, 279 P. 788;

Stephenson v. N. W. P. R. Co., 208 Cal. 749, 284 P. 913;

Shannon v. N. W. P. R. Co., 209 Cal. 303, 287 P. 91;
Young v. S. P. Co., 182 Cal. 369, 190 P. 36; 189 Cal.
 746, 210 P. 259.

“Where the view is obstructed he must place himself in a position where he can use his faculties of observation to advantage” (*Thompson v. S. P. Co.*, 31 Cal. App. 567, 161 P. 21; *Pepper v. S. P. Co.*, 105 Cal. 389, 401, 38 P. 974; *Young v. S. P. Co.*, 182 Cal. 369, 190 P. 36). Too, he must use added care in listening.

Herbert v. S. P. Co., 121 Cal. 227, 53 P. 651;
Pepper v. S. P. Co., 105 Cal. 389, 38 P. 974;
Koster v. S. P. Co., 207 Cal. 735, 767, 279 P. 788;
Flemming v. W. P. R. R. Co., 49 Cal. 253; not cited
 in Pacific;
Green v. S. P. Co., 132 Cal. 254, 259, 64 P. 255.

It is so obvious that the thing to be listened for and looked for is an approaching train that it would hardly seem necessary to waste words saying so. Yet the courts have taken occasion to point this out (*Loftus v. P. E. Ry. Co.*, 166 Cal. 464, 137 P. 34; *Murray v. S. P. Co.*, 177 Cal. 1, 169 P. 675; *Calif. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 269 P. 922). It seems equally obvious that looking anywhere around the countryside will not satisfy the rule. The looking must be done toward a point where the train or cars may be. There is only one such point—that is along the track—down the track in the direction from which danger may come.

Not only must the looking be directed at the line of the railroad, and be for approaching engines or cars, but it must be efficient looking. It is the traveler's duty to look “in such manner as would enable him to determine if he

could proceed in safety'' (*Calif. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 269 P. 922). When the view is "unobstructed it is the duty of the motorist to see what can be seen'' (*Parker v. S. P. Co.*, 204 Cal. 609, 269 P. 622). The law presumes that he does (*Young v. S. P. Co.*, 189 Cal. 746, 210 P. 259; *Billig v. S. P. Co.*, 192 Cal. 357, 219 P. 992; *Cate v. Fresno T. Co.*, 213 Cal. 190, 2 P.2d 364).

Where the view of a crossing is unobstructed and the approaching train or car is, consequently, in plain sight, the inference of negligence is inescapable. If the traveler does not look he is guilty of negligence. If he does look and sees, and attempts to cross the path of the approaching train he is guilty of negligence. If he looks, but looks heedlessly, and does not see the train, he is guilty of negligence.

In *Calif. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 269 P. 922, the driver, while covering a distance of 32 feet, had an unobstructed view of the approaching car. The Court said:

"During this time he either failed to look to the right at all, or if he did so, he must have looked heedlessly. In either case his negligence was apparent. He cannot be cleared of the charge of negligence by a showing that he stopped the truck on a line with the trees and there looked to the right."

In *N. Y. etc. Co. v. U. R. R.*, 191 Cal. 96, 215 P. 72, the Court said:

"It is the rule in this state that where the physical facts shown by the undisputed evidence raised the inevitable inference that a person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train which

was plainly open to his view, he is, as matter of law, guilty of contributory negligence."

Accord:

Heroux v. A. T. & S. F. Ry. Co., 28 C.A.2d 401, 82 P.2d 738;

Martz v. Ry. Co., 31 Cal. App. 592, 161 P. 16;

Jones v. S. P. Co., 34 Cal. App. 629 (hr. den.), 168 P. 586;

Cate v. Fresno Traction Co., 213 Cal. 190, 2 P.2d 364;

Glascocock v. R. R. Co., 73 Cal. 137, 14 P. 518;

Larrabee v. W. P. Ry. Co., 173 Cal. 743, 161 P. 750;

Chic. etc. Co. v. Houston, 95 U.S. 697, 24 L.ed. 542;

Northern P. R. Co. v. Freeman, 174 U.S. 379, 43 L.ed. 1014;

Atchison etc. Co. v. McNulty, 285 F.97 (C.C.A. 8) cert. den. 262 U.S. 746, 67 L.ed. 1212.

If the traveler, "taking these precautions, would have seen or heard the approaching train, the very fact he was injured will raise a presumption that he did not take the required precautions."

Herbert v. S. P. Co., 121 Cal. 227, 53 P. 651;

Green v. S. P. Co., 132 Cal. 254, 64 P. 255;

Bilton v. S. P. Co., 148 Cal. 443, 83 P. 440;

Koster v. S. P. Co., 207 Cal. 753, 279 P. 788;

Scott v. San Bernardino etc. Co., 152 Cal. 604, 93 P. 677;

Hutson v. Ry. Co., 150 Cal. 701, 89 P. 1093;

Griffin v. S. P. etc. Co., 170 Cal. 772, 151 P. 282;

Larrabee v. W. P. Ry. Co., 173 Cal. 743, 161 P. 750.

"A collision at a railroad crossing is *prima facie* evidence of negligence on the part of traveler."

Robbins v. S. P. Co., 102 Cal. App. 744, 752, 283 P. 850.

“When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in the face of all the oral testimony, that such precautions were taken.”

Northern P. R. Co. v. Freeman, 174 U.S. 379, 43 L.ed. 1014.

In viewing testimony the rule is that:

“If the established facts and conditions are such as to make it plain that plaintiff, looking and listening, must have seen or heard an approaching train, his testimony that he looked and listened, but did not see or hear, is not enough to support a verdict in his favor.”

Loftus v. Ry. Co., 166 Cal. 464, 137 P. 34;

Chrissinger v. S. P. Co., 169 Cal. 619, 149 P. 175;

Zibbell v. S. P. Co., 160 Cal. 237, 116 P. 513;

Jones v. S. P. Co., 34 Cal. App. 629 (hr. den.), 168 P. 586;

Hughes v. Atchison etc. Co., 121 Cal. App. 271 (hr. den.), 8 P.2d 853;

O'Neill v. Reading Co., 296 Pa. 319, 145 Atl. 840;

Penn. R. Co. v. Yingling, 148 Md. 169, 129 Atl. 36;

U. P. R. R. Co. v. Rosewater, 157 F. 168 (C.C.A. 8);

Atchison etc. Co. v. McNulty, 285 F. 97 (C.C.A. 8), cert. den. 262 U.S. 746, 67 L.ed. 1212;

McNabb v. Va. Ry. Co., 55 F.2d 137 (C.C.A. 4).

Lastly, it has been argued that but for the negligence of the defendant railroad company, as to speed, in not giving signals, or in some other respect, the accident would not have happened in spite of plaintiff's negligence, and that plaintiff's want of attention was in fact induced by the defendant's failure—that the plaintiff relied upon the

defendant to use care and by reason of this reliance was trapped.

This view has been uniformly rejected. The highway traveler may not successfully contend that unusual speed of the train (*Larrabee v. W. P. R. Co.*, 173 Cal. 743, 161 Pac. 750; *Green v. So. Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926; *Argo v. S. P. Co.*, 39 C.A.2d 706, 104 Pac.2d 77) or absence of the usual whistle or bell (*Hager v. S. P. Co.*, 98 Cal. 309, 33 Pac. 119; *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Hutson v. So. Cal. Ry.*, 150 Cal. 701, 89 Pac. 1093; *Griffin v. San Pedro Ry.*, 170 Cal. 772, 151 Pac. 282; *Hoffart v. S. P. Co.*, 33 C.A.2d 591, 92 Pac.2d 436, **or fog** (*Hoffman v. S. P. Co.*, 84 Cal. App. 337, 258 Pac. 397) or dust (*Flemming v. W. P. R. Co.*, 49 Cal. 253) relieves him of his failure to observe and avoid the approaching train.

B. The Driver of the Automobile, John Martin Souza, Was Guilty of Contributory Negligence as Matter of Law.

Under the cases and rules above, and under the cases presently to be noticed, John Martin Souza, in driving his car onto the crossing, was guilty of contributory negligence as a matter of law.

For the purpose of this argument we shall consider only the evidence produced by the plaintiffs and particularly the testimony of John, the driver.²²

John was thoroughly familiar with the crossing. He knew where the tracks were (R. 123) and he actually saw

22. On the trial most of the evidence relied on by plaintiffs was contradicted by independent eye witnesses. Plaintiffs' witnesses were discredited and impeached. Their stories were inconsistent and improbable. Although we consider only the plaintiffs' evidence on this argument, we do so only for the purpose of this argument. Most of it warrants no other consideration.

them as he approached them that morning from a distance of about 100 or 200 feet back (R. 123).²³ The tracks were the main line tracks of the Southern Pacific San Joaquin Valley line from San Francisco to Los Angeles and he knew that trains could be expected at any time. His surroundings, without more, were an imperative warning which he was required to heed. He was required to look and keep looking (see p. 24 above). He could not expect trains to stop for him. It was his duty to stop for them. He knew this.²⁴

According to John he drove east on Beckwith Road about 35 to 40 miles per hour but slowed down within 100 to 200 feet²⁵ of the crossing. During the last 90 feet of his approach to the crossing there was nothing to obstruct his view²⁶ (see photographs and diagram reproduced herein). He says he slowed down to 15 miles per hour at 60 feet from the crossing and came to a stop 20 feet from the tracks (R. 103). He first looked to his right and then to his left (R. 104). He claimed there was "a sort of haze hanging low and he could not see any more than 200

23. At another place he gave the distance as about 75 or 100 feet (R. 124).

24. "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him." *Koster v. S. P. Co.*, 207 Cal. 753, 762, 279 Pac. 788, 794.

25. At another place he said "200 to 300 feet; maybe less" (R. 137).

26. There was no claim or evidence of any obstruction to view further back (R. 80, 124).

yards²⁷ down the track'' (R. 104).²⁸ Testimony produced by plaintiffs, and by which they are bound, established that the visibility at the time of the accident was at least 2,162 feet or more, regardless of the claimed haze.²⁹ He says he heard no whistle,³⁰ no bell and no sound of an approaching train.³¹ He says he then put the car in low gear and proceeded from a stop up to a speed of 3 to 4 miles per hour at the time of the accident (R. 111, 156). He admits he didn't look down the tracks again until he was astraddle of the tracks when something caused him to look up and

27. This is on direct examination. The 200 yards was not an inadvertence used to mean feet. On cross examination he used both 200 yards and 600 feet. His attorney fixed it at the same distance in the opening statement. At other places John referred to the visibility as 600 feet (R. 146, 157). The 600 feet was **unimpaired vision down the track**, as brought out by his attorney on redirect examination.

“Q. In other words, I want to know **how far down those tracks you had an unimpaired vision.**

A. I would say I could see about 600 feet.” (R. 157)

28. John repeatedly and positively fixed the visibility down the track at 200 yards or 600 feet, but on cross examination admitted that it was no more than a guess and that he had not fixed the distance by any object (R. 144).

29. Davis, plaintiffs' witness, testified that he saw the accident from a point 1162 feet from the crossing and that he saw the engine come to a stop 1000 feet beyond the crossing (R. 169, 170).

30. Davis, plaintiffs' witness, testified that the train whistled, sounded a “blast” just after the engine crossed North Road (R. 168), 3,579.6 feet from Beckwith Road (R. 274). On plaintiffs' case, then, the whistle was blown approximately 30 seconds before the accident. John did not even hear this whistle which was established by his own witness.

31. He also said he heard no noise of the train when he finally did see it only 50 or 75 feet away (R. 111).

he saw a train 50 or 75 feet away (R. 104). He said he did not know what made him look to his right (R. 143, 111).

John's approach to the crossing was at a 45° angle so that as he approached the tracks his car was headed partially in the direction from which the locomotive was coming.³² Photographs of the locomotive in evidence show it to be a large passenger type engine with the front painted a silver, or aluminum color,³³ to make it more readily seen from a greater distance. Its speed as it approached the crossing was estimated by the plaintiffs' witnesses at 60 miles³⁴ per hour and 65 to 70 miles per hour.³⁵ Admittedly, and on the driver's testimony, it could

32. The locomotive was coming from his right. Stopped, as he claims, 20 feet from the tracks, he was facing half way in the direction from which the locomotive was coming, so that by the slightest turn of his head he could have seen the locomotive within the range of his admitted visibility as the locomotive and his automobile approached each other half-way head on.

33. Inasmuch as this was conceded, it was unnecessary for plaintiffs' witness Davis to testify positively and of his own knowledge as to the color of the front end of the locomotive. The physical facts and his testimony as to his conduct, establish that he never saw the front end of the locomotive.

34. This estimate was by the same Davis. The testimony by Davis as to his conduct and the physical facts appearing from the diagram (Court's Exhibit 1) show that he was in substantial error as to this estimate of speed or mistaken in his testimony as to his own conduct.

35. This estimate was by Johnston, who, at the time of the accident, was the fireman of the locomotive. For the purpose of this argument, his estimate must be accepted. It should be noted, however, that his original report after the accident was contrary to his testimony, and his testimony is contradicted by independent witnesses and by the only other living member of his crew.

be seen at least 600 feet away, yet John did not see it until it was 50 to 75 feet from him.

John's testimony is, then, a statement that he continued to drive a slowly moving automobile from a point 20 feet west of the tracks directly onto the tracks and into the path of a locomotive, visible to him for at least the last 600 feet of its approach to the crossing. His testimony admits that having looked once to his right, he did not look again until he was on the tracks and it was too late to avoid the collision.

Beckwith Road to the west and the railroad track to the south are both straight for a considerable distance, more than a mile. As noted above, Beckwith Road crosses the track at an angle so that the automobile driver approaching from the west has a better view of the tracks to his right than to his left, in fact can look down the track to his right without turning his head.³⁶ There was no obstruction to his view and no charge or claim of any obstruction was made on the trial.

In such circumstances John could not have avoided seeing the locomotive as it approached the crossing if he had looked. Even at an assumed speed of 70 miles per hour, the greatest speed estimate given by any of plaintiffs' witnesses, the locomotive would require approximately 6 seconds to travel the last 600 feet in plain view of the driver and occupants of the automobile. During this same period of time the automobile would travel at least 27 feet at 3 miles an hour and 36 feet at 4 miles per hour. On John's own testimony the locomotive must have been within his vision before he started from the place where he

36. See footnote 32.

stopped, and it was in his view constantly as he proceeded from there slowly forward and still in a place of safety until he reached the tracks. This accident can be explained only by one of two alternatives, either he did not look, or if he did, he must have seen the locomotive and carelessly misjudged its speed and proceeded on and attempted to cross in front of it. If he had looked he would have seen the engine visible for at least 600 feet, 200 yards, on his own testimony. It was his duty to look. It was his duty to see (see p. 28 et seq., above).

John says he looked once, while stopped, saw and heard nothing and drove onto the track without ever looking again and seeing the plainly visible train.

The slightest movement of John's eyes would have disclosed the approaching locomotive. He didn't have to turn to look out the side window. His auto was headed half-way head on towards the locomotive. He failed to take the slightest heed for his safety.

Had he been paying the slightest attention he would have looked again as he drove toward the tracks after having stopped, and certainly he would have looked before finally driving on the track. To fail to do this is contributory negligence as a matter of law. The highway traveler may not look once and refuse to look again. His duty is a continuing one, he must look and keep on looking for the danger he knows exists. His duty has been standardized and crystallized into rules of law to be determined by the courts and may not be left to be determined in each case by a jury.

In *California Rendering Co. v. P. E. Ry.*, 205 Cal. 73, 269 Pac. 922, the driver claimed to have stopped 32 feet

from the track, and looked to the east, from which point he could see 300 feet down the track. He then looked west, and seeing nothing started across the track. Like Souza, he did not look again to the east, his right, until one wheel was on the track, when he first saw the train about 300 feet away. A judgment in his favor was reversed, the Supreme Court of California holding him guilty of contributory negligence as matter of law for traveling 32 feet during which time the approaching car was in view and for failing to look to his right at all or looking heedlessly.

In *Stephenson v. Northwestern Pac. R. Co.*, 208 Cal. 749, 284 Pac. 913, the facts are these: Stephenson drove his car up to the track, looked up and down, saw nothing, heard no whistle or bell, so started across the track in low gear at not over 5 or 6 miles an hour. He estimated that when he last looked he could see down the track about 100 feet. Poor visibility was claimed as an excuse for failing to see the train, it being one-half hour before sunset on a cloudy and stormy day.

A judgment for plaintiff was reversed, the Supreme Court of California holding (page 752) (p. 914 of 284 P.): "There seems to be no escape from the conclusion that respondent was negligent in failing to observe the approach of the train under the circumstances."

The Court points out (page 751) (p. 914 of 284 P.):

"The permanent objects on the ground there show that, after passing the corner of the packing house, one could see down the track in excess of four hundred feet. During the time the last twenty or twenty-five feet was traversed by respondent just prior to the collision, the engine must have been plainly visible

to him if he had looked. Had he seen the danger he could have stopped in safety because traveling in low gear at a slow rate of speed in an automobile in good condition. A train at forty miles an hour would travel not over two hundred feet, while a motorist travels twenty-five feet at five miles per hour."

In *Shannon v. Northwestern Pac. R. R. Co.*, 209 Cal. 303, 287 Pac. 91, a nonsuit was affirmed where plaintiff, after stopping 8 feet from the near track and waiting for an eastbound train to pass on that track, drove his car at from 3 to 5 miles per hour, in third (low) gear from that point to the far track where he was hit by a westbound train. His claims of failure to see the westbound train, traveling at high speed, or of failure of that train to whistle, did not free him of contributory negligence in driving from the stopping place to the collision point, when, as the trial court pointed out (p. 305 of opinion): "And after Mr. Shannon did start up, there is no question at all if he looked down there he could see three or four hundred feet down the track. And going three to five miles and hour he could have stopped, because anywhere along here would have been a place of safety."

One of the most recent California cases affirming the rule is *Argo v. S. P. Co.*, 39 C.A.2d 706, 104 P.2d 77, in which a nonsuit was reversed for failure to submit the question of "last clear chance" to the jury. The decision, however, holds that the driver was guilty of negligence as matter of law for driving 28 feet at between 5 or 6 miles an hour, or a decreased speed, and the court points out (page 709) (pp. 79-80 of 104 P.2d):

"It has frequently been said in the decisions that the railroad track of a steam railway must itself be

regarded as a sign of danger. The slow rate of speed at which decedent was traveling enabled him to avoid the accident up to the time when he was within a few feet of the railroad track. The negligence of the unfortunate man was therefore continuous up to the time he was practically upon the rails. With the picture presented by the facts of this case it would be idle to attempt to show ordinary care or prudence upon the part of the deceased. In fact, to justify the conduct of decedent, we would be required to do violence to practically every railroad crossing case in the State of California."

If Souza had looked, he must have seen the train. If he did not look, or looked heedlessly, he was negligent (*California Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 269 Pac. 922). If he did look, the law presumes he saw the train (*Young v. S. P. Co.*, 189 Cal. 746, 210 Pac. 259), for one cannot "look with unseeing eyes" (*Zibble v. S. P. Co.*, 160 Cal. 237, 116 Pac. 513).

C. The Contributory Negligence of the Driver John Souza Is Imputed by Law to His Father, Antonio Azevedo Souza.

Under §352(b) of the California Vehicle Code, the negligence of John was imputed to his father, Antonio Azevedo Souza.

California Vehicle Code §352(b) provides in part: "Any negligence * * * of a minor * * * in driving a motor vehicle on a highway with the express or implied permission of the parents * * * of the minor shall be imputed to such parents * * * for all purposes of civil damages * * *."

It was conceded by the plaintiffs that John was a minor at the time of the accident and that he was driving the

car with the consent of his father (R. 77). If John was negligent, the statute applied to bar his father's recovery.

The imputation of negligence to the parent extends to actions in which the rights and obligations of the parent are involved in civil actions for damages and the negligence of the minor may be set up as a defense to an action brought on behalf of the parent or for the parent's death.^{36a}

Milgate v. Wraith, 19 C.2d 297, 121 P.2d 10;

Rawlins v. Lory, 44 C.A.2d 20, 111 P.2d 973;

Solloway v. Watts, 58 C.A.2d 595, 137 P.2d 477;

Grover v. Sharp etc. Co., 56 C.A.2d 736, 153 P.2d 83 (hr. den.).

That the driver, John Souza, was guilty of contributory negligence as matter of law has been argued above. If that be so, his contributory negligence as matter of law bars the action brought for his father's death, and the trial court should have directed a verdict for the defendant in his father's case as well as his own.

The trial court refused to direct a verdict and submitted the issue of John's negligence to the jury. Having so decided, he was then required to instruct that under Vehicle Code §352(b), if John was negligent, such negligence would be imputed to his father as a matter of law. There were no other facts on this issue to be determined by the jury.

If John was negligent then, all the facts necessary to make this statute applicable to bar the father's recovery as matter of law were stipulated to or conceded on trial.

36a. See footnote 6 above.

The question was solely one of law and the court should have so instructed.

Defense instruction No. 37 was properly drawn and would have correctly instructed the jury as to the provisions of §352(b) and then advised them that if there was any negligence on the part of John which was a proximate cause of the accident, such negligence was to be imputed to the father under that section. The court modified this instruction and submitted to the jury as a question of fact for them to determine whether John was driving with the consent of his father. Exception was taken to the modification (R. 397).

The trial court's instruction permitted the jury, if they so chose, to refuse to apply the vehicle code section by determining that there was no consent by the father.

There was no such issue. It was conceded at the outset in plaintiffs' opening statement. Plaintiffs' counsel told the jury that there was such a vehicle code provision and that because of that the case brought by Mrs. Antonio Souza and her children was governed by the same rules as the case brought by John Souza (R. 77).

Even without that concession, there was no issue for the jury on the question of consent because the father was riding with his son at the time of the accident and his consent was continued throughout.

The vice of the instruction as modified is that it permitted the jury to determine the preliminary fact which should have been decided by the court as matter of law and which would permit them to find under the court's instruction that the statute did not apply. It did apply as matter of law. The issue submitted was not for the jury.

D. Error in the Giving of Plaintiff's Proposed Instruction No. 9 and in the Refusal of Defendant's Proposed Instruction No. 27.

At the plaintiffs' request, the court instructed the jury as follows:

"You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution, as required by law." (R. 380)

The instruction is contrary to law, and improperly instructed the jury on a basic issue of the case. A person approaching a railroad track cannot assume or anticipate that the operators of the railroad equipment will operate it in any particular way or with due care and caution. In *Hutson v. So. Cal. Ry. Co.*, 150 Cal. 701, 89 P. 1093, the court said:

"It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but it is opposed to the law as laid down in the decisions of this state and of the Supreme Court of the United States. *Such a rule would abrogate the doctrine of contributory negligence in all such cases, * * ** The rule is simply this: That a railroad crossing from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that care will be exercised in the operation of the train. Says the Circuit Court of Appeals in *Erie Ry. Co. v. Kane*, 118 F. 234 * * *

"There are instances where as matter of law it is neg-

ligence not to anticipate negligence in others. As, for instance, it is well settled in the Federal Courts that it is negligence for a highway traveler not to anticipate failure on the part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals.' This is in accord with the doctrine of the Supreme Court of the United States as laid down in *Railroad Co. v. Houston*, 95 U.S. 697, where it is said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger.' " (Emphasis added.)

Accord:

Flemming v. W. P. R. Co., 49 Cal. 253;

Holmes v. Ry Co., 97 Cal. 161, 170, 31 Pac. 834;

Green v. So. Cal. Ry. Co., 138 Cal. 1, 7, 70 Pac. 926;

Herbert v. So. Pac. Co., 121 Cal. 227, 53 Pac. 651;³⁷

37. The facts relied upon were that the bell and whistle were not sounded and the fireman was not in his place. The Court said: "The argument, of course, is that if the signals had been given plaintiff might have heard, and, not hearing them, he had the right to assume when about to make the crossing that the train had not then reached the whistling post thirteen hundred and twenty feet above, and that the fireman might have seen him in time to have prevented the accident had he been upon the lookout. It may be that all this was culpable negligence on the part of defendant's employees. The defense of contributory negli-

Sego v. So. Pac. Co., 137 Cal. 405, 70 Pac. 279;³⁸

Green v. Los Angeles etc. Ry. Co., 143 Cal. 31, 76 Pac. 719;³⁹

Koch v. Southern Cal. Ry. Co., 148 Cal. 677, 84 Pac. 176;⁴⁰

Martin v. So. Pac. Co., 150 Cal. 124, 88 Pac. 701;⁴¹

gence implies that defendant may have been guilty of such negligence as would justify a recovery by the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant."

38. The Court said: "It appeals to sound reason that, even conceding a railroad company to be guilty of willful and wanton negligence in handling its train, still those acts upon its part can be no excuse for the traveler to close his eyes to approaching danger and rush blindly into it. No conduct on the part of the company, no matter how willful and wanton, will relieve a person from using ordinary care in preserving himself from danger and consequent injury."

39. Here it was argued that the precautions taken would have been entirely sufficient "if the train had not been running at a reckless rate of speed, and that the plaintiff had a right to assume that it would only move at a lawful and proper rate." The argument was answered by a quotation of the language quoted above (footnote 37) from the Herbert Case, and the Court itself added: "There is, in other words, no occasion for the application of the rule as to contributory negligence, except in cases where it is shown or assumed that the defendant has been guilty of actionable negligence."

40. The Court said: "A railway crossing is itself a place of danger and is an effectual warning of danger, a warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company itself to exercise reasonable care."

41. In this case it is said, "that notwithstanding the employees operating a train may be guilty of negligence in failing to give the statutory signals," still, if by obeying the stop, look, and listen rule the traveler could have discovered the approach of the train and himself have avoided danger, "his failure to do so will constitute contributory negligence."

Griffin v. San Pedro etc. R. Co., 170 Cal. 772, 151 Pac. 282;⁴²

The matter was reinvestigated at large in *Larrabee v. W. P. Ry. Co.*, 173 Cal. 743, 161 Pac. 750, the *Griffin* and *Koch Cases* were followed and two earlier cases were disapproved for intimating that the rule was to the contrary. Two later cases applying the rule of the *Larrabee Case* are *N. Y. etc. Co. v. U. R. R.*, 191 Cal. 96, 215 Pac. 72,⁴³ and *Koster v. S. P. Co.*, 207 Cal. 753, 279 Pac. 788.

See also:

So. Pac. Co. v. Day, 38 F.2d 958 (C.C.A. 9);

Chicago etc. Co. v. Houston, 95 U.S. 697, 24 L.ed. 542;

N. P. R. Co. v. Freeman, 174 U.S. 379, 43 L.ed. 1014;

Schofield v. Ry. Co., 114 U.S. 615, 29 L.ed. 224;

Calloway v. Penn. R. Co., 62 F.2d 27 (C.C.A. 4).

42. This case contains a rather extensive review of earlier California cases, and the Court said, referring to the duty of a traveler on a highway approaching a railroad crossing: "It is his duty to use all of his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * A person approaching a railway track which is itself a warning of danger must take advantage of every reasonable opportunity to look and listen. * * * A traveler who is about to cross a railway track at a place where ordinarily the engineer gives appropriate signals of the approach of the train, may not depend upon such custom or even upon a duty enjoined by law, to give such signals."

43. The Court said that a truck driver "was not justified in relying upon the assumption that the motorman would not in any way be negligent in the operation of his car, and, therefore, the driver was not warranted in believing that the car was being operated at the usual and ordinary rate of speed."

It will probably be urged that the instruction immediately following the one complained of cured the error. That is not true. The error in the instruction complained of is more pointed. By the following instruction (R. 380), the court told the jury that if John or the other occupants of the car were negligent, their negligence would not be excused by the negligence of the defendant. That is a correct statement of the law, but it does not reach the vice of the previous instruction and does not cure it. By the instruction complained of, the jury was told that in measuring the standard of care required of them, the circumstances should be viewed in the light of the assumption by them that defendant would use due care. They can make no such assumption. They cannot rely on any particular anticipated conduct of the defendant. By the following instruction, the jury was merely told that if they found John or the occupants of the car were negligent, on the basis of the standard set by the instruction complained of, they would not be excused, because of negligence on the part of the defendant.

Specific instructions at other points in the charge as to the duty of the driver to stop, look, and listen likewise did not cure the error of this instruction. By this instruction, the jury was told that the driver need only stop, look, and listen to the extent necessary to protect himself from harm from a train being operated cautiously and with due care, that is, in looking, he need only look for a train being operated at a careful and cautious speed; or in listening, he need only listen for the whistle or bell that should be blown or rung. That is not the law, he "must take advantage of every reasonable opportunity to look and listen."⁴⁴

44. Griffin Case, *supra*, see footnote 42 above.

The instruction set a false standard by which the conduct of the driver and occupants of the car was to be measured. It was prejudicial.

Upon the other hand, it is equally well settled that the operators of the railroad equipment are entitled to presume that any person approaching the railroad track would perform the duty imposed on him and would use due care and caution. Defendant's proposed instruction No. 27, refused by the court, would have so instructed the jury. The instruction is clearly correct.

In *Bashan v. S. P. Co.*, 176 Cal. 320, 324, 168 Pac. 366, the court said:

“The persons thus operating a train have the right to assume that the other party will exercise his faculties and use ordinary care for his own safety.”

The rule is too well settled to warrant further discussion. If further authority is necessary, the following can be consulted:

Holmes v. Ry. Co., 97 Cal. 161, 31 Pac. 834;⁴⁵

45. A passenger waiting for a train at a station was struck by the incoming train. “If it be assumed that the deceased was actually seen by those in charge of the train before the whistle sounded, still we do not think, under the facts here appearing, that the engineer was guilty of any negligence in not sounding the alarm-whistle before he did. In addition to the noise which was made by the moving train, the usual signal of its approach was given by ringing the bell, and as the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself,—as he was in fact,—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct for self-preservation, move away from the track before being overtaken by the engine.” It was also held that the deceased was guilty of contributory negligence as matter of law.

Green v. Los Angeles, etc. Co., 143 Cal. 31, 76 Pac. 719;⁴⁶

Lambert v. S. P. R. Co., 146 Cal. 231, 79 Pac. 873;⁴⁷

Arnold v. S. F.-O.T. Rys., 175 Cal. 1, 164 Pac. 798;⁴⁸

46. The Court said: "During all the time that she was approaching along the pathway to the crossing she was in a position of absolute safety, and there is no rule of law which charged the engineer with knowledge that she was about to change her position of safety for one of peril. On the contrary, the engineer had a right to assume that she was in possession of her faculties and would retain her place of safety, and not recklessly expose herself to danger. To hold that the engineer, because she gave no indication of knowledge of the approach of the train, was bound to assume that she would heedlessly leave a place of safety, put herself upon the track, and endanger her life, would be to revise the rule which, as far as we are advised, is universal in all jurisdictions, and certainly is the rule in this state, that where an engineer sees a person approaching a track he has the right to presume that the person is in possession of his ordinary faculties, alert to the danger which may ensue from passing trains, that he will not attempt to cross in view of the train, and is therefore not required to check the speed of the train to enable him to cross in front of it, or to ascertain whether he is about to do so."

47. "The fireman did not know that the plaintiff was deaf, and was not bound to assume that the driver of a team so approaching a crossing in broad daylight, with an unobstructed view—the team merely trotting along—would not check his horses in a place of safety." Here there was testimony that the train was not sounding either bell or whistle.

48. "The defendant's motorman was not required to presume that Arnold would not perform this duty. He had the right to presume that Arnold would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary. So long as it appeared that Arnold, with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track (*Thompson v. Los Angeles etc. Co.*, 165 Cal. 748, [134 Pac. 709])."

Busch v. L. A. Ry. Co., 178 Cal. 536, 539, 174 Pac. 665;⁴⁹

Young v. S. P. Co., 182 Cal. 369, 380, 190 Pac. 36;⁵⁰

Depons v. Ariss, 182 Cal. 485, 487, 188 Pac. 797;⁵¹

Billig v. S. P. Co., 192 Cal. 357, 363, 364, 219 Pac. 992;⁵²

49. An instruction which announced the rule was approved.

50. The trainmen "had a right to rely upon" the traveler's "continuing obligation to observe the approach of the train."

51. A truck struck a man who was on foot, killing him. "Under these circumstances no duty was imposed upon the driver of the truck to assume that deceased would suddenly expose himself to imminent peril. On the contrary, he had a right to conclude that he would not recklessly move directly in front of the approaching machine." For this the court cites the *Green and Basham Cases*.

52. The court quotes *Young v. S. P. Co.*, 189 Cal. 746, 210 Pac. 259, in part as follows: "The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing." It then goes on:

"Turning from the right and duty of persons approaching upon a highway at its intersection with a suburban railroad to the right and duty of the engineer or motorman in charge of such suburban train or car in approaching such intersection, this Court was held in numerous and uniform cases that such engineer and motorman has the right to presume that a person thus approaching the crossing of a suburban railway will perform the duty which the law imposes upon him under the foregoing authorities, and in the reasonable exercise of his faculties of observation and caution will not essay such crossing until the danger due to the approaching train or car has passed, and it has accordingly been held that the operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing

McNeil v. East Bay Street Rys., 220 Cal. 591, 598, 599, 32 Pac.(2d) 598;⁵³

regard. In the case of *Basham v. Southern Pac. Co.*, 176 Cal. 320 [168 Pac. 359], the rule is thus stated: 'When a person is approaching a place of danger and all of the warnings of the danger have been given that reasonable care requires, those in charge of the dangerous engine, seeing him thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue his approach until he gets into the very place of danger, when it is obvious that he could with the least care stop and avoid it'."

53. A railroad train struck a street car. A street car passenger was injured. A judgment against the railroad and its engine men was reversed and the judgment against the street car company was affirmed. The court had this to say: "These defendants claim they were not negligent. We think there is no evidence that they were. It is not claimed that there was any act of negligence unless the engineer or the fireman was negligent. As to the engineer it is clear that he was at his post of duty and duly attentive. There is not a particle of evidence that any stop signal or sign of danger was seen or could have been seen by him, or that he could have seen the street car. As to the fireman he was at his post of duty and duly attentive. It is true he saw the street car and saw its movements. Considering all of the facts as recited above, nothing shows or tends to show that he was negligent. He was not called upon to stop the train nor to notify the engineer until he became aware that the street car was actually going to attempt to cross the track in front of the oncoming train. When the fireman was exercising due care regarding the agency which he was helping to operate he had the right to assume that the motorman in charge of the street car would exercise due care and would not actually attempt to cross the track. (*Young v. Southern Pac. Co.*, 189 Cal. 746, 754 [210 Pac. 259]; *Green v. Los Angeles etc. Ry. Co.*, 143 Cal. 31 [76 Pac. 719, 101 Am. St. Rep. 68].) When, thereafter, he came to a realization that the motorman was going to make said attempt the fireman acted promptly. But it was then too late. Be that as it may, such facts do not show negligence on the part of any one of these defendants."

Matteson v. S. P. Co., 6 Cal. App. 318, 92 Pac. 101;⁵⁴

Schooley v. Fresno Traction Co., 56 Cal. App. 705,
711, 206 Pac. 481;⁵⁵

54. The court approved instructions giving to the jury the rule with which we are here concerned.

55. The court said: "That testimony shows beyond question that the deceased was negligent in stepping upon the tracks of the defendant company, directly in front of an on-coming car, which was plainly in view at the time he stepped upon the track if deceased had chosen to glance in its direction. * * * Surely, under the language of the cases hereafter cited, and under any rational system of law, defendant could not be charged with a duty to anticipate that anyone would suddenly step from a place of safety on to the car tracks in the middle of a block, directly in front of an approaching street car.

"We think such gross negligence on the part of a pedestrian will bar all right of recovery for any injuries which he may sustain. It is said in 25 R.C.L., p. 1285: 'However, where a foot-passenger walks or steps directly in front of an approaching car and is struck the instant he sets his foot between the rails there is but one inference that can reasonably be drawn from that fact, that is, the inference of contributory negligence.' * * *

"In the case of *Lee v. Market St. Ry. Co.*, 135 Cal. 293 [67 Pac. 765], it is said: 'That a man under these circumstances should thus heedlessly cross a public street in the middle of the block and know nothing of the approach of a street car until the moment when it struck him is a demonstration of carelessness and negligence so complete as to require no comment.' * * *

"There is no proof that the motorman failed to keep an outlook or that he failed to use proper care in stopping the car after discovering deceased's peril. Indeed, it is plain that if the deceased stepped over the rail and was almost instantly struck, as appears in the present case, then no outlook which the motorman could possibly have kept would have enabled him to stop the car in time to avoid the accident. Deceased was not in a position of peril until he stepped upon the rail and he could not have taken more than a step or two, going at an ordinary gait, before he was struck. Until almost the moment he was struck, then, no outlook would have disclosed him in a position of danger, for he was not in such a position. * * *"

Dolon v. Green, 72 C.A.2d 427, 436, 164 Pac.(2d) 795;⁵⁶

Gore v. Market Street Ry. Co., 4 C.2d 154, 157, 48 Pac.(2d) 2;⁵⁷

Rather v. San Francisco, 81 C.A.2d 625, 184 Pac.(2d) 727;⁵⁸

56. The court quotes and follows the *Billig Case*, above.

57. Street car and pedestrian. "Had the motorman seen plaintiff before she passed from the westbound to the eastbound tracks, and in time to stop the car, he still could not have foreseen that she would leave her place of safety on said westbound tracks. He had the right to assume that she would maintain her position there; her presence would have afforded no warning that she would proceed in the path of the car." It was also held the pedestrian was guilty of contributory negligence. An order denying a motion for judgment notwithstanding the verdict in favor of plaintiff was reversed.

58. "In *Korchack v. Pacific Electric Ry. Co.*, 9 Cal. App. 2d 89, 93 [48 P.2d 752], the court said:

" 'During all of the time that a pedestrian is approaching a railroad track he is in a position of absolute safety. The law is well established that an engineer or a motorman is not charged with knowledge that the pedestrian will change his position to one of peril, but he has a right to assume that the pedestrian will exercise his faculties of observation and caution, and will not remove himself from a place of safety and recklessly expose himself to danger, when it is obvious that with the slightest care he could stop and avoid the peril. (*Green v. Los Angeles Terminal Ry. Co.*, 143 Cal. 31 [76 P. 719, 101 Am. St. Rep. 68]; *Billig v. Southern Pacific Co.*, supra [192 Cal. 357 (219 P. 992)]; *Basham v. Southern Pacific Co.*, 176 Cal. 320 [168 P. 359]; *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 161 [31 P. 834]; *Green v. Southern Pacific Co.*, 122 Cal. 563 [55 P. 577]; *Choquette v. Key System Transit Co.*, supra [118 Cal. App. 643 (5 P. 2d 921)].)' "

Levin v. Brown, 81 C.A.2d 913, 918, 185 Pac.(2d) 329.⁵⁹

The proposed instruction goes to the very heart of the standard of care required by defendant. It is the basis on which the conduct of defendant is to be measured. The only charge of negligence is in the operation of the train. Specific instructions were given as to speed, whistle and bell. Aside from this, the jury was given no standard by which to measure the conduct of the defendant. The verdict was general. We cannot determine the basis for the finding of the jury that defendant was negligent. On the questions of speed, whistle and bell, the evidence was sharply conflicting. It is possible that the jury could have found for the defendant, on the evidence presented, on the issues of speed, whistle and bell, but nevertheless have determined that the defendant was negligent for not anticipating that the driver would proceed across the tracks in front of the train. The proposed instruction would have filled the gap.

In fact, on the evidence presented, the jury should have found for the defendant on these issues. The evidence is as follows:

Speed: For the defendant—The engineer is dead and his testimony is unavailable. Mellolo, a brakeman riding

59. "A motorman is not charged with knowledge that a pedestrian will leave a place of safety for one of grave peril, or that he will not exercise his faculties of observation and caution and recklessly expose himself to danger, when it is clear that by merely seeing an obvious, destructive engine and by remaining off its fixed and certain path he would be assured of his safety. (*Korchak v. Pacific Electric Railway Co.*, 9 Cal. App. 2d 89, 93 [48 P. 2d 752].)"

in the cab of the engine, fixed the speed at 40 M.P.H. (R. 255). Brown, independent eye witness, estimated speed at 40 M.P.H. (R. 324). Stetson, independent eye witness, estimated speed at 30 M.P.H. (R. 334), between 20 to 30 M.P.H. (R. 347), and about 10 M.P.H. faster than the speed of the Souza automobile (R. 346).

For the plaintiff—John had no estimate of the speed of the engine. Davis estimated the speed at 60 M.P.H. (R. 172). Johnston estimated the speed at 65 to 70 M.P.H. (R. 425).

Whistle and Bell: For the defendant—Mellolo testified the regular crossing whistle was blown (R. 256), and just prior to the accident an emergency whistle, a series of consecutive short blasts, was blown, and the whistle continued to blow up to and after the accident⁶⁰ (R. 255-6, 264, 265, 267, 268), but could not state as to the bell ring-

60. On cross-examination Mellolo testified: "Q. As a matter of fact, Mr. Mellolo, you do not have any independent memory of a whistle being sounded at Beckwith Road, do you?

A. I do, sir.

Q. Then your memory in that regard immediately at the time the engine went into emergency and you saw particles of the automobile flying, there was a series of short blasts, isn't that true?

A. The whistle was blowing, and if you ever ride an engine and it is your first time that you have ever seen anybody hit by a locomotive, you will never forget seeing it, and you will never forget that whistle. That was my first experience on a locomotive hitting an automobile.

Q. Just come back to my question. The whistle that you are talking about, however, was a series of short blasts that took place immediately at the time this car was struck, isn't that true?

A. He blew the crossing whistle between the crossing sign post and the crossing, and then after that there was a consecutive short blast" (R. 267).

ing because of the noise in the cab of the engine⁶¹ (R. 257). Mrs. Krepps, independent witness, at her home located approximately 200 feet south of the tracks and 400 feet southeast of the crossing, heard "the train whistle and it whistled and whistled and then I heard it crash and I run around the corner of the house and saw the car"⁶² (R. 310). She could not remember the bell ringing (R. 311). Mrs. Disbrow, independent witness, in bed reading

61. Q. [by Mr. Dunne] Can you tell us whether or not as the locomotive approached this crossing where the accident happened, whether the engine bell was ringing?

A. No, I can't state because there are times you can hear the bell ringing and there are times you can't hear it ringing on an engine. When you go by buildings and signboards you can hear it ring; the echo, I believe. There are times you can't hear the bell ringing in the cab of the engine traveling at that speed.

Q. With the locomotive traveling light that way, is the locomotive itself, aside from any bell or whistle, making any noise?

A. Yes.

Q. You have been in a cab and all this is clear to you, but I wish you would tell the ladies and gentlemen who probably have not been in a cab what the noise in the cab is.

A. Well, it is a pounding noise, a rattling noise. It is almost impossible to talk in the cab of an engine traveling 35 to 40 miles an hour from the rattling and pounding of the engine. You have to scream in order to talk" (R. 257).

62. On cross-examination Mrs. Krepps testified: "Q. There was no difference between the whistle, in the middle of which you heard the crash, and the whistle that you heard after the crash, was there?

A. Well, I don't know. I know there was whistling and all at once I heard the crash, and then it whistled, I think, three times after that.

Q. How many times did it whistle before that?

A. Gosh, it was whistling when it was coming down the track before the crash.

Q. You recall that there was more than one whistle?

A. Yes, there was more than one whistle" (R. 313).

a book at the home of her mother, Mrs. Krepps, testified that her attention was drawn from her book by the insistent whistling⁶³ (R. 318). She did not hear the bell (R. 318). Brown heard the whistles and the noise of the engine (R. 323) but was not asked as to the bell. Stetson's attention was attracted while the engine was still more than 700 feet from the crossing by the noise of the rattling and pounding of the engine and the bell, but could not state whether or not the whistle was blown⁶⁴ (R. 333, 334, 335, 338, 340).

For the plaintiff—John did not hear the whistle⁶⁵ (R.

63. "Q. [by Mr. Dunne] What, if anything, first called your attention to the fact that there was an accident?

A. My attention was drawn from my book by the insistent whistling of the train. The train whistled more than it usually did when it made the crossing there, and I heard a crash, but I didn't pay too much attention to it until my mother called me and said there had been an accident" (R. 318).

64. Stetson was standing in the gas station, approximately 230 feet from the crossing. He testified: "Q. [by Mr. Dunne] One other thing. Are you able to tell us anything about a whistle on the locomotive, whether it was or was not sounded, or do you know?

A. I couldn't say whether it was blowing or whether it wasn't. It could have been blowing or wasn't blowing. That didn't attract my attention, at all. The whistle, it could have been blown or might not have been.

The Court: Q. What attracted your attention?

A. The bell on the engine and the rattling of the wheels on the engine" (R. 335).

65. "Q. [by Mr. Myers] When you stopped your automobile 20 feet from the crossing, will you tell us whether or not you listened?

A. Yes, I did.

Q. What, if anything, did you hear?

A. I didn't hear anything" (R. 109).

109). Davis heard one blast of the whistle just after the engine crossed North Avenue (R. 168). At the time of the accident Davis was over 1100 feet from the crossing. Johnston stated the bell was not rung (R. 426) and the whistle was not blown (R. 425, 426).

The testimony of Johnston and Davis must be viewed in the light of the contradictions, inconsistencies, improbabilities and the unusual circumstances surrounding their testimony.

Johnston had been employed by defendant Southern Pacific Company only two months before the accident. He refused to disclose the railroads for which he had previously worked (R. 441-2). He left the employ of defendant two weeks after the accident. He was named as a party defendant in the original actions filed in the State Court. Although he had not been served with process or subpoena, he voluntarily left his home in Florida and appeared prior to the time set for the trial in the State Court, for the purpose of testifying on behalf of the

“Q. [by Mr. Myers] First, Mr. Souza, was the window on your side of the car open, or was it closed?

A. It was open.

Q. How about the window on the other side of the car, was it open, or closed, that is, the righthand side?

A. It was closed.

Q. Tell us whether you heard any bell ringing, or whistle blowing immediately prior to the time the accident happened.

A. No, I did not hear anything.

Q. When you looked up and saw the locomotive 50 to 75 feet away from you, did you hear anything then?

A. No, I couldn't hear anything.

Q. Could you say whether the engine was working steam or not?

A. I couldn't tell; it was too quick” (R. 110-111).

plaintiff. The cases were called for trial in the State Court and plaintiffs announced they were ready to proceed, without having served him with process. After the case was removed to the Federal Court, he was served with process, but made no appearance, and no default was taken. This was the state of the case when his deposition was taken by plaintiff, and thereafter the case was dismissed as to him. With the death of the engineer, the only living person who could be charged with responsibility for this accident, which plaintiff's attorney characterized as murder, is Johnston. It is strange indeed that the action was voluntarily dismissed as to him. Shortly after the accident he made a written report (Dft's Ex. Q), and on the trial denied it in every particular. The details of that report were confirmed by Mellolo on the trial, and by the report submitted by engineer Glanville. His present story is contradicted by independent eye witnesses who have no reason to testify as to anything except what they saw and heard.

Davis was employed by a neighbor and friend of the Souzas. He was impeached from his deposition, he even changed the place where he claims to have been when he saw the accident. He claims to have been able to keep the locomotive in sight at all times from the North Avenue crossing until it came to a stop, according to him, a 1000 feet or more beyond the point of the accident, more than 2160 feet from the point where he was. He claims this in spite of his testimony that visibility was limited to 250 to 300 feet (R. 171), and without regard for the fact that trees between him and the tracks must have prevented him from seeing the locomotive. These trees are shown by

the photographs in evidence, and were located and fixed by actual measurements on the ground by the engineer who prepared the diagrams reproduced herein. On his testimony he was never in front of the locomotive, or in a position to see the front of the locomotive, yet he was willing to testify of his own knowledge that the front of the locomotive was painted silver (R. 170).

In these circumstances the jury could well have, and should have, disregarded the testimony of Johnston and Davis, which leaves for the plaintiff only the testimony of John, which is essentially negative in all important particulars, or involves only "I don't recall" or "I don't remember." The jury could have, and should have, believed the testimony of the independent witnesses on the question of the speed, whistle and bell, as confirmed by the only available and unimpeached member of the crew. It cannot be doubted that failure to give defendant's proposed instruction No. 27 was prejudicial.

Even assuming that plaintiff's instruction No. 9 as given by the court was proper, to single out the right of plaintiff to rely on the assumption of due care by defendant, without mention of the corresponding right of defendant, was to give undue prominence to one matter to the exclusion of an equally important matter. Such is error. *Rio Grande W. Ry. Co. v. Leak*, 163 U.S. 280, 41 L.ed. 160, 16 S.Ct. 1020. It is reversible error to submit the evidence and theory of one party prominently and fully and not call attention to the main points of the opposite party's case. *Pullman Company v. Hall*, 46 Fed. 2d 399; *Weiss v. Bethlehem Iron Co.*, (C.C.A. 3d) 88 Fed. 23, 30.

E. The Question of Joint Venture Should Have Been Submitted to the Jury and It Was Error to Refuse Instructions Properly Submitting the Issue.

We recognize the requirements necessary to establish a joint venture or joint enterprise. Whether John and his father and brother were engaged in a common undertaking in which they had the necessary community of interest was a question that should have been determined by the jury and not by the court. There was ample evidence from which the jury could have found a joint enterprise or they could have found none. The trial court refused defense instructions Nos. 38 and 39 which correctly stated the rules of law applicable to joint ventures and would have left it to the jury to decide, as it should, this basic question of fact.

It was established by the evidence that all three of the occupants of the car lived on a dairy ranch near Modesto (R. 98-99).

On the evening before the accident, John had read an advertisement in the paper of a ranch for lease (R. 118). All three of them, John, his father and his brother Edward, discussed it the night before and they decided they would look at it and pass their opinion on it (R. 79). It was the intent to stock it with beef, but John did not have the money to buy the beef (R. 119). It had not been determined how the enterprise was to be financed, but John couldn't do it alone. The details were still under discussion. In any event, John was a minor and any lease or contract made would have to be made to or by the father or older brother, Edward.

John testified his father and brother were to give their "approval" (R. 101) of the ranch. They were to give their help and advice (R. 122).

It was for the jury and not for the court to draw the inferences from this evidence.

F. Other Errors in Instructions.

The court refused to give defendant's proposed instruction No. 56 which would have told the jury that if the approach of the locomotive could have been learned, then the very fact of the collision raises a presumption either that the driver of the automobile did not take the required precautions and did not look or listen, or having looked and listened he endeavored to cross in front of the train, and in either event he would be guilty of negligence proximately contributing to the accident. There can be no question as to the propriety of the instruction. The rule is so well settled that it requires no discussion, and needs no additional authority other than the cases cited in the body of the instruction. If other authority is desired, see cases cited above at page 29.

Failure to give the instruction was particularly prejudicial in this case, in the light of the physical conditions. Visibility, at the very minimum was 600 feet. The view was unobstructed. The driver of the automobile, by the merest glance, the slightest turning of his head, must have seen the locomotive while he was still in a position of safety.

So also the failure to give defendant's proposed instruction No. 58, which in substance stated that if the circumstances were such that the driver, by looking, must have

seen the locomotive in time to have avoided it, any testimony that he looked and did not see may be disregarded by the jury, in the light of the physical facts and surroundings at the scene of the accident, was highly prejudicial. The correctness of the instruction is well settled, and needs no discussion. If authorities are needed, see cases set forth above at page 30.

Defendant's proposed instruction No. 58-A would have told the jury that the mere fact that two other persons were in the car, did not relieve them, or any of them, from the duty of exercising ordinary care with respect to the operation of the automobile. The court refused the instruction. The matter was not sufficiently covered by other instructions given as to the general duty of each of the occupants of the car to exercise ordinary care for his own safety, the duty of each extends to the operation of the car. In the case of *Martindale v. A. T. & S. F. Ry. Co.*, 89 A.C.A. 459 (1948), 201 Pac.(2d) 48, judgment for the defendant was affirmed, and the court said:

“While a passenger who has no control over the automobile or the driver is not held to the same rule as to contributory negligence as the driver and it is not demanded of the passenger that he exercise the same high degree of observation as is required by the driver (see *Hoffart v. Southern Pacific Co.*, 33 Cal. App. 2d 591, 596 [92 P.2d 436]; *Switzler v. Atchison, etc. Co.*, 104 Cal. App. 138, 144 [285 P. 918]), nevertheless he is normally bound to protest against actual negligence or recklessness of the driver, the extent of his duty in this regard depending upon the particular circumstances of each case, and it is a question for the jury (*Wagner v. Atchison Co.*, 210 Cal. 526, 528

[292 P. 645]). It is presumed that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing (*Young v. Southern Pacific Co.*, 189 Cal. 746, 754 [210 P. 259]; *Cate v. Fresno Traction Co.*, 213 Cal. 190, 195-6 [2 P.2d 364].) Therefore it was a question for the jury to determine whether the passengers in Martindale's car should have heard or seen the train."

It has been repeatedly held that this is a matter that should be submitted to the jury, and the refusal of this instruction and the failure to submit this issue to the jury was prejudicial, particularly in light of the physical facts and surroundings at the time of the accident, where either of the occupants of the automobile, as well as the driver, must have learned of the presence of the locomotive by a mere glance or the slightest turning of the head. The occupants, as well as the driver, were facing half-way in the direction from which the locomotive was coming (see footnote 32).

CONCLUSION

In this case it cannot be seriously contended that John Souza exercised ordinary care in driving his automobile up to and on the tracks with a locomotive bearing down on him plainly visible to him, had he looked, for at least the last 600 feet of its approach to the crossing. Since he was approaching the locomotive half-way head on, it required only the slightest glance to his right to see what should have been seen by looking. He admits he did not look. If he had, the unfortunate accident would never have occurred.

In such circumstances the authorities have long recognized and still hold fast to the rule that the trial court should and must rule that the driver is guilty of contributory negligence as matter of law. The dilemma of the plaintiffs' position is clear. There are only three choices; either John didn't look when by looking he could have stopped; or having looked he didn't see that which he could have seen; or having looked and seen, he mistakenly thought he could proceed across in safety.

There is no choice consistent with the exercise of ordinary care on the part of the driver. There being none, the rule is one of law.

To submit the issue to the jury was error. The error in submitting it was made the worse by the instructions of the court. These errors affect all three cases and their prejudicial effect is best demonstrated by the verdicts of the jury.

It will be necessary for this court to overrule every known California case involving accidents at railroad crossings if John Souza's conduct, according to his own testimony, is ordinary care.

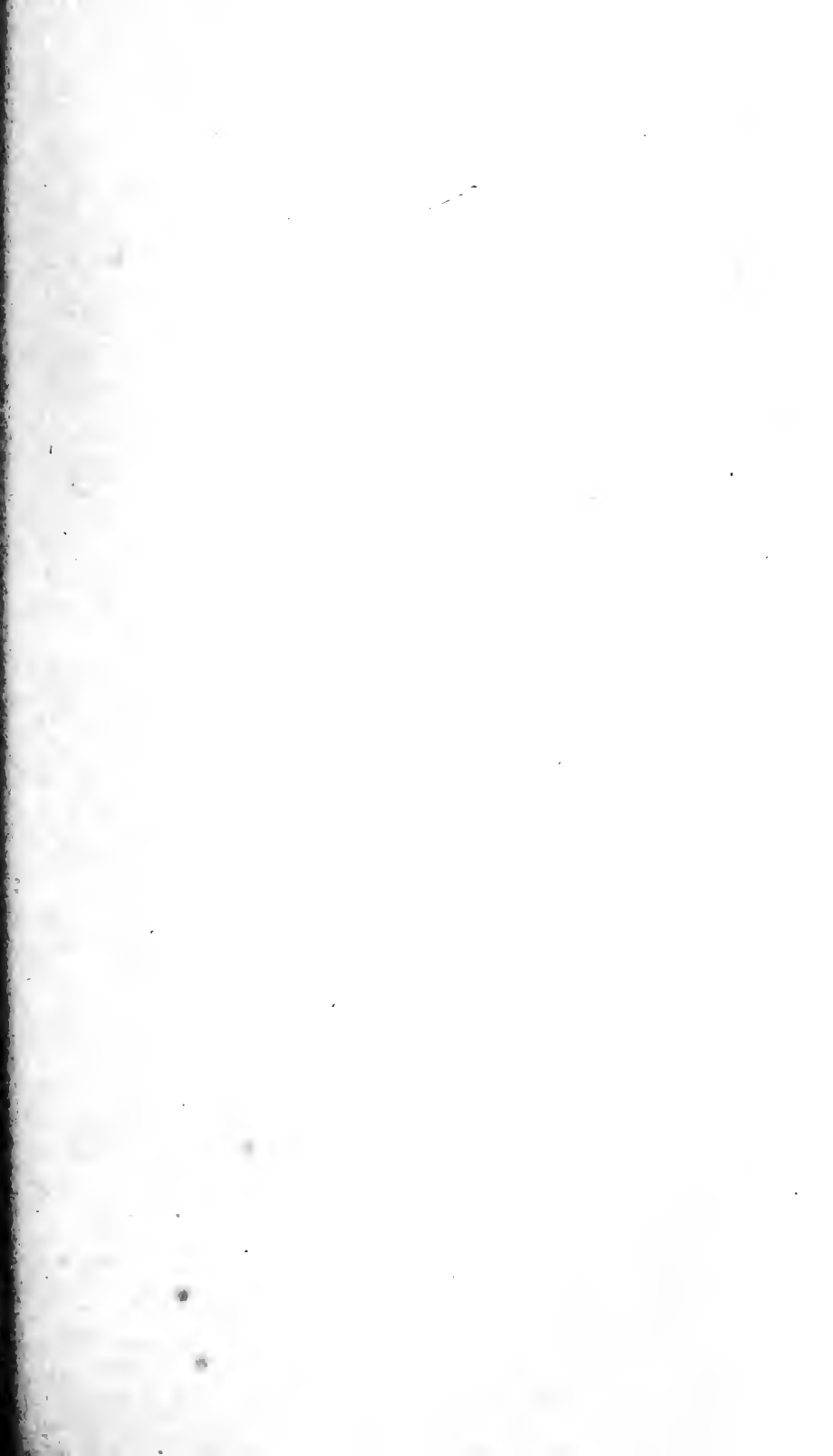
It is respectfully submitted that the Jury's verdicts and the judgments thereon should not be permitted to stand and should be reversed.

Dated at San Francisco, California, July 1, 1949.

ARTHUR B. DUNNE

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Attorneys for Appellant





No. 12,153

IN THE

United States Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY

(a corporation),

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE
SOUZA, JAMES LAWRENCE SOUZA, BEN-
JAMIN SOUZA, minors, by and through
their guardian ad litem, Josephine
Souza, JOSEPHINE SOUZA, individually,
and MARY ADELE SOUZA and GERALDINE
SOUZA, LAWRENCE SOUZA and RICHARD
SOUZA, minors, by and through their
guardian ad litem, H. G. Eastman,

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

	Page
Statement of the case	1
Facts	4
The basis of appellee's case	8
Argument	8
(a) Negligence of the Southern Pacific Company	8
(b) Appellee John Martin Souza was not guilty of contributory negligence as a matter of law	12
(c) Appellant's authorities distinguished	24
(d) The contributory negligence of the driver John Martin Souza is imputed to his father as a matter of law is a moot controversy	27
(e) The court clearly instructed the jury that appellee John Martin Souza had the right to assume that appellant would obey the law	28
(f) The question of joint venture is moot	36
(g) Appellant's proposed Instructions 56, 58 and 58-a were properly refused by the trial court	37
Conclusion	39

Table of Authorities Cited

Cases	Pages
Argo v. Southern Pacific Co., 39 C. A. (2d) 706	24
B. & O. Ry. Co. v. Goodman, 275 U. S. 66, 72 L. Ed. 167, 48 S. Ct. Rep. 24	22, 24
Brown v. Luster, 165 Fed. (2d) 181	38
California Rendering Co. v. Pacific Electric Ry. Co., 205 Cal. 73	25
Chesapeake & Ohio Ry. Co. v. Waid, 25 Fed. (2d) 366.....	15, 16, 17, 19, 24, 32
Dickinson v. Pacific Greyhound Lines, 55 C. A. (2d) 824...	31
Eastman v. A. T. & S. F. Ry. Co., 51 Cal. App. (2d) 653....	12
Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 36 L. Ed. 485..	24
Harris v. Johnson, 174 Cal. 55	30
Hoffman v. Southern Pacific Company, 101 Cal. App. 218..	2
Koster v. Southern Pacific Company, 207 Cal. 753.....	25
Larson v. Lewis-Simas-Jones Co., 29 C. A. (2d) 83, 84 P. (2d) 296	36
Nelson v. Southern Pacific Company, 8 Cal. (2d) 648.....	19, 20
Peri v. Los Angeles Junction Railway, 22 Cal. (2d) 111....	4, 18
Shannon v. Northwestern Pacific R. Co., 209 Cal. 303.....	25
Toschi v. Christian, 24 Cal. (2d) 354.....	4, 23
Pokora v. Wabash Ry. Co., 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149, 91 A.L.R. 1049	17, 22, 24
Stephenson v. Northwestern Pacific R. Co., 208 Cal. 749....	26
Strong v. Sacramento & Placerville R. R. Co. (1882), 61 Cal. 326	29

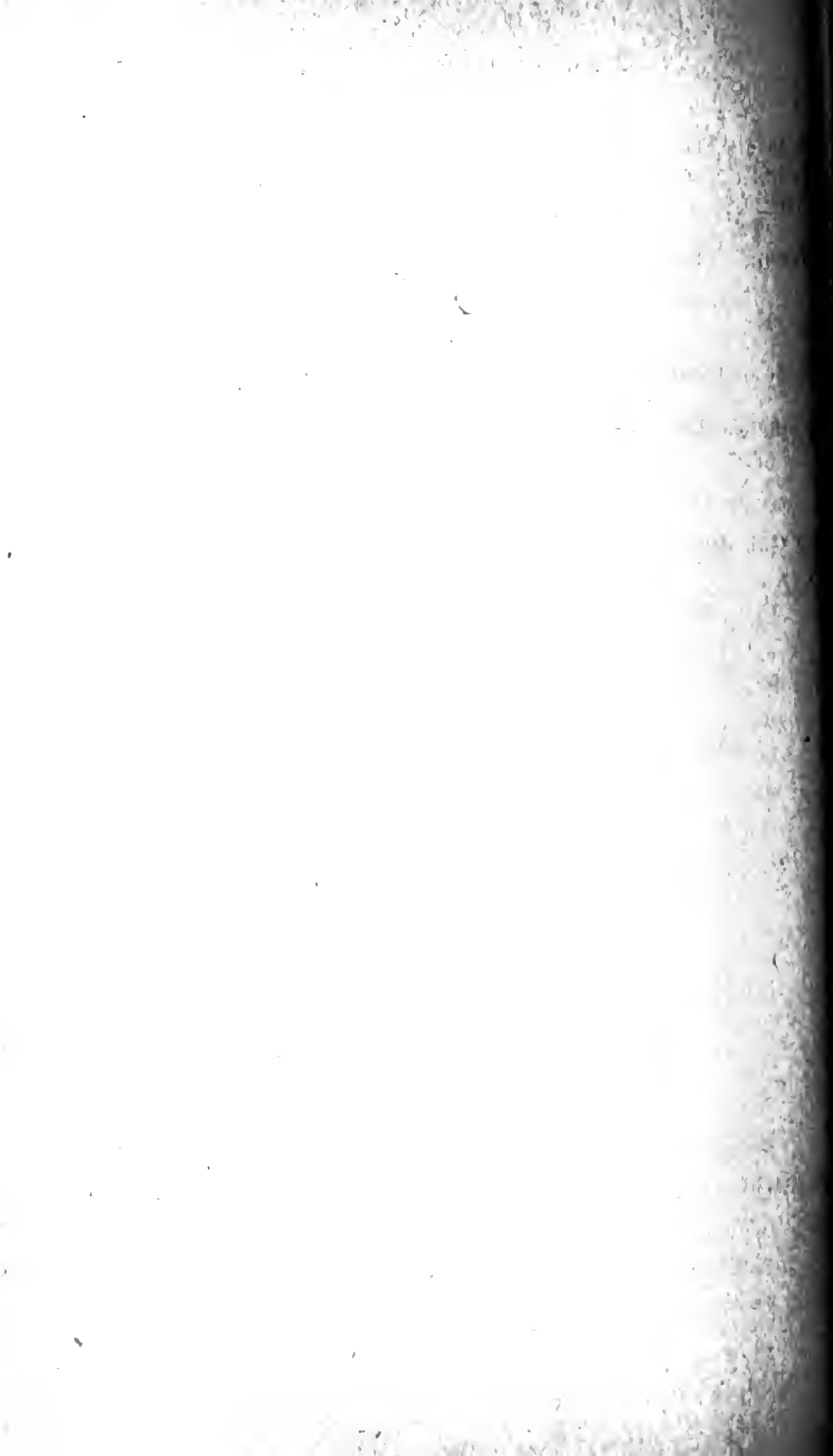
	Page
White v. Davis, 103 C. A. 531	31
Wiltsee v. Calif. Emp. Com., 69 C. A. (2d) 120, 156 P. (2d) 612	36
Young v. Southern Pacific Co., 189 Cal. 746.....	25

Codes

Code of Civil Procedure, Section 1963, subdivision 33.....	29
Vehicle Code, Section 353(6)	27

Texts

19' Cal. Juris. 596, Section 35, Negligence.....	29
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Appellant,

VS.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and through their guardian ad litem, Josephine Souza, JOSEPHINE SOUZA, individually, and MARY ADELE SOUZA and GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD SOUZA, minors, by and through their guardian ad litem, H. G. Eastman,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This action involves three actions which were consolidated for convenience of trial. The appellee John Martin Souza filed an action to recover for personal injuries which he sustained when his automobile was struck by a train operated by the Southern Pacific

Company, a corporation, at the intersection of Beckwith Road and the main line track of the Southern Pacific Company extending between San Francisco and Los Angeles, the said crossing being located in Stanislaus County, California. The accident happened on the 11th day of October, 1945.

In the same accident Antonio Azevedo Souza and Edward Souza received injuries which resulted in their death. Two actions were filed to recover damages which were caused by reason of the two deaths. One was filed by Josephine Souza and the surviving children for the death of Antonio and one was filed by Geraldine Souza and the surviving children for the death of Edward.

These actions were originally filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and were subsequently removed to the United States District Court where they were tried. The cases were tried before a jury and resulted in verdicts in favor of the appellees; the sum of one thousand one hundred fifty (\$1150.00) dollars being awarded to appellee John Martin Souza, the sum of thirty one thousand forty-seven and 38/100 (\$31,047.38) dollars being awarded to appellee Geraldine Souza and the sum of sixteen thousand one hundred seven and 38/100 (\$16,107.38) dollars being awarded to the appellee Josephine Souza. Judgments were entered thereafter in accordance with the verdict of the jury.

Subsequently, appellant filed a motion for judgment notwithstanding the verdict and for a new trial. Both

of these motions, after hearing, were denied by the trial Court.

The appellant has listed five specifications of error. The first four of the specifications deal with questions of fact and can be grouped under one heading; namely "Was the Evidence Sufficient to Sustain the Verdict of the Jury?" Tied in with this issue is the question as to whether or not the evidence showed the appellee John Martin Souza guilty of contributory negligence as a matter of law. The fifth specification of error involves the alleged erroneous instruction of the jury.

Before proceeding to outline the facts, we feel that it is necessary to call the Court's attention to the often-cited rule, that when considering the evidence after a jury verdict, all conflicts and all contradictions are to be resolved in favor of the appellee and all reasonable inferences are to be drawn from the evidence in favor of the appellee. We feel it necessary to restate the facts, as appellant has evidently overlooked that law in its opening brief, which states the facts with conflicts and contradictions resolved in appellant's favor and inferences drawn in favor of appellant, all contrary to the law.

"Turning first to the last mentioned contention it must be remembered that the jury was the sole judge of the credibility of witnesses and the weight of the evidence. Those matters are not within the province of an Appellate Court. It may be trite, but nonetheless pertinent to refer to the rule stated by this Court in *Crawford v. Southern Pacific Company*, 3 Cal. (2d) 427, 429 (45 P. (2d) 183):

“ ‘In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict, if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the Appellate Court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deducted from the facts, the reviewing Court is without power to substitute its deductions for those of the trial Court.’ ”

Peri v. Los Angeles Junction Railway, 22 Cal. (2d) 111.

“It is elementary, however, that on appeal from a judgment of nonsuit the evidence shall be viewed in the light most favorable to plaintiff. * * * Application of this rule strikes down at once, and without necessity for further comment thereon, all those portions of defendant’s argument which depend upon the resolution of conflicting inferences favorable to defendant.”

Toschi v. Christian, 24 Cal. (2d) 354.

FACTS.

Viewing the facts in the light of the foregoing law, the evidence shows the following:

The accident out of which these three actions arose occurred at the intersection of Beckwith Road and the

Southern Pacific Main line track between San Francisco and Los Angeles. The date of the accident was October 11, 1945, and the time was approximately 9:10 A. M.

This intersection is approximately two miles north of the City of Modesto, Stanislaus County, California. Beckwith Road is a two lane macadam highway which extends in a general northeasterly and southwesterly direction and intersects the aforesaid main line Southern Pacific track at an angle of approximately 45°. The Southern Pacific track extends in a general northwesterly and southeasterly direction. Beckwith Road crosses the Southern Pacific main line track and joins U. S. California Highway 99, which is on the north side of the track and which parallels the Southern Pacific main line track.

Appellee John Martin Souza the night before the accident occurred had read an advertisement in the paper concerning a ranch which he thought he might be interested in for the purpose of stocking it with beef. (T. R. page 118.) He had been considering such an undertaking for about six months. (T. R. page 117.) On the morning after reading the advertisement, he started out to inspect the ranch that was advertised in the paper and he asked his father Antonio Azevedo Souza and his brother Edward Souza to go along to get their approval. (T. R. page 101.) Appellee John Martin Souza started for the ranch in a 1941 model Ford Coupe which he owned. (T. R. page 100.) Appellee John Martin Souza drove the automobile, his

brother Edward sat next to him and his father Antonio was furthest to the right. (T. R. page 100.)

They left home shortly before 9:00 A. M. (T. R. page 102) and the accident happened between 9:00 and 9:15 A. M.

As they approached the Southern Pacific main line track they were travelling in a northeasterly direction on Beckwith Road. (T. R. page 102.) The speed of the automobile as they drove along Beckwith Road was between thirty-five and forty miles an hour. (T. R. page 102.) When they came within 100 to 200 feet of the crossing where the accident happened, appellee John Martin Souza began slowing down his automobile (T. R. page 102) and when he was at a point approximately sixty feet from the track his estimated speed was fifteen miles per hour. (T. R. page 103.) He continued slowing the speed of his automobile and finally came to a complete stop with the front of his automobile approximately twenty feet from the tracks. (T. R. page 102.) After he had brought his automobile to a stop, he looked first to his right and then he looked to his left and in looking he saw no train approaching either from his right or from his left. (T. R. page 104.) He estimated that he spent approximately two seconds of time looking in each direction. (T. R. page 111.) During the time that he was stopped and looking in each direction for the approach of a train, he listened for a bell or whistle or some sound of the approach of a train. He did not hear the train nor did he hear a bell or a whistle. (T. R. pages 109, 110.) There was nothing wrong with his hearing and

the window was open on the driver's side of the automobile. (T. R. pages 109, 110.) After stopping, looking and listening for an estimated four seconds, appellee John Martin Souza shifted his automobile into low gear and started across the track at some three to four miles an hour. (T. R. page 111.) When he was on the track, he again looked to his right and saw for the first time the engine of the Southern Pacific Company which was then approximately fifty to seventy-five feet away (T. R. page 104) and the accident occurred immediately. (T. R. page 111.) Appellee John Martin Souza was familiar with this crossing as he drove over it approximately three times a week. (T. R. page 116.)

It was a cool morning and there was a mist or haze that limited the appellee John Martin Souza's vision to an estimated 200 yards or six hundred feet. (T. R. pages 104 and 144.) Because of this haze, appellee John Martin Souza did not have a clear view. (T. R. page 104.) This haze was ordinary for the time of year and limited visibility from two hundred feet to one thousand feet, depending upon what you were looking toward. (T. R. page 162.) The position of the sun as appellee John Martin Souza looked to his right had a tendency to distort his vision. (T. R. page 105.) The engine front was silver in color, making it difficult to see in the haze (T. R. page 428) and it was traveling at a speed of between sixty-five and seventy miles an hour. (T. R. page 425.) It was approaching the Beckwith Road crossing from the south. (T. R. page 424.) The engine whistle was not sounded for the

crossing as required by law, nor was the bell rung before the accident. (T. R. page 426.) The engineer, immediately before the accident, was holding a conversation with a brakeman who was riding in the cab of the locomotive (T. R. page 426) and after the accident he told the fireman, "You see what happens when you don't blow the whistle." (T. R. page 430.) Failure to blow the whistle and to ring the bell violated three of the Southern Pacific rules (T. R. page 210) and the law of the State of California. (T. R. pages 372, 373.)

THE BASIS OF APPELLEES' CASE.

These actions were tried upon the theory that the appellant carelessly and negligently operated its train across Beckwith Road without proper warning of its approach and in violation of the rules of the appellant company and the laws of the State of California. That under the conditions as they existed at the time, the driver of the automobile was in the exercise of ordinary care and caution as he proceeded on to the crossing after having stopped, looked and listened.

ARGUMENT.

(a) NEGLIGENCE OF THE SOUTHERN PACIFIC COMPANY.

There was ample evidence in the record to establish negligence upon the part of the Southern Pacific Railroad Company. The driver of the automobile, John Martin Souza, testified that he did not hear a bell or whistle even though he listened with his window open.

“Mr. Myers. Q. First, Mr. Souza, was the window on your side of the car open or was it closed?

A. It was open.

Q. How about the window on the other side of the car, was it open or closed; that is, the right hand side?

A. It was closed.

Q. Tell us whether you heard any bell ringing or whistle blowing immediately prior to the time the accident happened.

A. No, I did not hear anything.”

(T. R. page 110.)

The fireman, who was on the side of the locomotive from which the automobile approached the track and whose duty it was to ring the bell on the engine, testified that he did not ring the bell, and neither did the engineer sound the whistle.

“Q. Now, when the engine was about 200 feet from the crossing, going at the speed that you have said it was going, can you tell us whether or not the whistle was blowing or the bell ringing at that time?

A. There was no whistle. He might have blowed the whistle after we hit the car, I don’t know, don’t recall. I was nervous.

Q. But up to the time of the collision——

A. No, there was no whistle.

Q. How about the bell, was any bell ringing?

A. Well, there might have been a bell afterwards, but I turned the valve on and the bell didn’t ring. I saw the car—I thought the car was stopped, and it wasn’t necessary to use the hand cord.

Q. For a distance of a quarter of a mile prior to reaching the intersection of Beckwith Road and the Southern Pacific right of way can you tell us whether or not in that distance the bell was ringing or the whistle blowing, either one?

A. No, it wasn't.

Q. What, if anything, was the engineer and this other person that was riding in the cab of the engine doing at the time of the happening of the accident?

A. Well, they were holding a conversation.

Q. Where was the engineer? I mean by that what was his position at the time?

A. Well, in order so that this brakeman could hear him he was facing the brakeman, which would be facing me. I am across from him."

(T. R. pages 425 and 426.)

This testimony was further corroborated by the statement made by the engineer immediately after the accident in which he called attention to "what happens when the whistle is not blown."

"Q. (by Mr. Myers). During the happening of the accident, or immediately thereafter, did the engineer make any comment at all as to the whistle blowing?

* * * * *

A. Yes. After we got stopped—I don't know whether he was talking to me or the brakeman—but he did say, 'You see what happens when you don't blow the whistle.' "

(T. R. pages 429, 430.)

The train was traveling at between sixty-five and seventy miles an hour according to Fireman H. J. Johnston.

“Q. How fast was the engine going at that particular time?

A. I would say between sixty-five and seventy miles an hour.

Q. For what distance had it been travelling at that speed of sixty-five to seventy miles an hour?

A. For a number of miles, I don't recall just how many, but a number of miles—after we left Modesto.”

(T. R. page 425.)

The law is well established that failure to sound the warnings required by law establishes negligence.

“It is doubtless the law that failure to comply with the regulations prescribed by Section 486 of the Civil Code as to ringing the bell and blowing the whistle of a railroad train upon approaching a street crossing is *prima facie* evidence of negligence on the part of the railroad company (Parker v. Southern Pacific Company, 204 Cal. 609 (269 Pac. 622); Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291 (24 Pac. 661)); and that where the evidence is conflicting as to whether the train crew complied with such statutory requirement, the implied finding of the jury adverse to the railroad company is binding on appeal. (Krause v. Rarity, 210 Cal. 644 (293 Pac. 62, 77 A.L.R. 1327); Pietrofitta v. Southern Pacific Co., 107 Cal. App. 575 (290 Pac. 597); Hoffman v. Southern Pacific Co., 215 Cal. 454 (11 P. (2d) 387).) Furthermore, the Courts have held that if a witness is in a position to hear the bell or the whistle of the locomotive and he testifies he heard neither, such testimony is sufficient to raise a conflict with

positive testimony to the contrary that such warnings were given. (*Jones v. Southern Pacific Co.*, 74 C. A. 10 (239 P. 429); *Lindsey v. Pacific Electric Ry. Co.*, 111 C. A. 482 (296 P. 131); *Lahey v. Southern Pacific Co.*, 16 C. A. (2d) 652 (61 P. (2d) 461); *Hamilton v. Pacific Electric Ry. Co.*, 12 Cal. (2d) 598 (86 P. (2d) 829); *Thuet v. S. P. Co.*, 135 C. A. 527 (27 P. (2d) 910)."

Eastman v. A. T. & S. F. Ry. Co., 51 Cal. App. (2d) 653 at 660.

(b) APPELLEE JOHN MARTIN SOUZA WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

The principal argument of appellant is that the driver of the automobile, John Martin Souza, was guilty of negligence as a matter of law. There is no basis for such an argument. He did everything that an ordinarily prudent person would have done under the circumstances. He stopped his automobile before reaching the crossing and, while stopped, he looked and he listened and then he proceeded on across the track and the accident happened within a matter of a few seconds.

"Q. (of John Martin Souza). While you were at a standstill; in other words, while your car was stopped 20 feet from the tracks, I believe you said you looked to your right. About how long did you spend in looking to the right; just how much time elapsed while you were looking to the right?

A. About two seconds.

Q. I believe you stated you then looked to the left. About how much time elapsed while you looked to the left?

A. About another two seconds."

(T. R. page 111.)

"Q. When you stopped your automobile 20 feet from the crossing, will you tell us whether or not you listened?

A. Yes, I did.

Q. What, if anything, did you hear?

A. I didn't hear anything."

(T. R. page 109.)

The weather conditions as they existed at the time of the accident, although ordinary, limited and distorted appellee John Martin Souza's view of the track, particularly in the direction from which the train approached, as he had to look into the sun in that direction.

"Q. (of John Martin Souza). What kind of a morning was it, that is, with reference to climatic conditions, visibility and so forth?

A. Well, it was a cool morning. It was sort of a haze hanging low and I couldn't see any more than about 200 yards down the track, got no clear view.

Q. How about the sun, was it visible?

A. Yes, the sun was visible.

Q. Where was it with reference to you?

A. Well, it was directly, just about directly east of me, maybe a little south.

Q. A little south of east?

A. Right.

Q. How high in the sky was it, I mean with reference to your vision in the car?

A. It was at an angle.

Q. Were the rays showing directly upon the top of your car, or was it directly ahead of you?

A. It was shining in the windshield, I could see it.

Q. This haze that you speak of, was that a haze that was something like a fog, or was it something lighter than fog, or—well, describe it.

A. It was lighter than fog, being sort of a haze.

Q. Was your vision affected with reference to the direction you looked? What I mean by that, was there any difference in looking toward the sun or away from the sun?

A. Well, it naturally would distort my vision.

Q. Looking in what direction?

A. When I looked right directly on the sun.

Q. When you looked to the left, how about that?

A. The sun wouldn't hinder me when I looked to my left."

(T. R. pages 104, 105.)

"Q. When you looked to your right and you looked to the left, what if anything did you observe with reference to this mist or haze that you have described? In other words, I want to know how far down those tracks you had an unimpaired vision.

A. I would say I could see about 600 feet.

Q. And that would be in what direction? Just one direction or both directions?

A. Well, I could probably see a little more to the left as the sun would be in my eyes.”

(T. R. pages 156, 157.)

Under these facts whether or not the driver of the automobile, John Martin Souza, was guilty of contributory negligence was purely a question of fact to be determined by the jury.

Under circumstances which are strikingly similar, it was held that the determination of negligence and contributory negligence were questions of fact for the jury. In *Chesapeake & Ohio Ry. Co. v. Waid*, 25 Fed. (2d) 366, the Court stated:

“The question under all the circumstances was a proper one for the jury. The plaintiff stopped, looked and listened, if he told the truth, and whether he told the truth was for the jury. The question whether he exercised as much care in looking and listening as he should have done was also for the jury. The question whether, having stopped, looked and listened 145 feet from the crossing without seeing or hearing anything, ordinary care and prudence required him to stop again before going upon the tracks, and whether he could have been in the exercise of due care in looking and listening where he neither heard nor saw the train until he got upon the tracks, were questions of fact and circumstances for the jury.”

This same case holds that where a person drives upon a railroad track and an accident happens within six or eight seconds from the time such person stopped and looked that such conduct does not establish con-

tributory negligence as a matter of law, but presents a question of fact for the jury.

“He testified that he was travelling at the rate of six or eight miles an hour, and, as the District Judge has pointed out, this means that not more than six or eight seconds elapsed from the time when he looked at the corner of the terminal building and the time when he was struck. He might have seen the approaching cars if he had looked a second time in the direction from which they were coming before going on the track. But we think that he should not be held guilty of contributory negligence as a matter of law because he did not look twice in the same direction within six seconds.”

“The engine to his left demanded a share of his attention. The crossing itself demanded a share. Under such circumstances, is he to be held guilty of negligence as a matter of law because of his failure to see a danger which, if his evidence be believed, he looked for once only six seconds before he was struck, and failed to see because of defendant’s negligent failure to display the lights and give the signals which every traveler along the highway had a right to expect? We think not.”

Chesapeake & Ohio Ry. Co. v. Waid (supra).

It was further held in the same case that the jury is to determine whether or not ordinary care was used in looking and listening.

“How intently and how constantly, or how often, after listening and looking in the exercise of the prudence of a reasonably careful man, depends upon all the circumstances; and one of the cir-

cumstances is the rightful expectation of the traveler that the railroad will perform the duty required by law and by ordinary care of warning him by sounding a locomotive bell or whistle on approaching a crossing. Whether a traveler on the highway has looked and listened as a man of ordinary prudence would is generally a question for the jury."

Chesapeake & Ohio Ry. Co. v. Waid (supra).

In crossing cases such as this, the question of contributory negligence is for the jury. The circumstances here are such that different conclusions can be reached from the facts as presented. In citing the language of the case of *Pokora v. Wabash Ry. Co.*, 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149, 91 A.L.R. 1049, the Supreme Court of the State of California states:

"Too frequently appellate Courts have ignored those fundamental principles when dealing with railroad crossing accidents, and have arbitrarily substituted their conclusions of law as to the care a man of ordinary prudence would exercise under the circumstances presented to the trier of facts. The correct approach is expressed in *Pokora v. Wabash Ry. Co.*, 292 U. S. 98, 105 (54 S. Ct. 580, 78 L. Ed. 1149, 91 A.L.R. 1049), involving a crossing accident, where contributory negligence is discussed:

" 'Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is more urgent when there is no background of experience out of which the standards have

emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury."

Peri v. L. A. Junction Ry., 22 C. (2d) 111.

Appellees concede and make no point of the fact that the law is well established that a traveler must look from a point where looking will be effective and listen likewise, and if he can neither see nor hear, he must stop. This is not new law. However, in those cases where the rule has been applied, the evidence conclusively established that the accident would not have occurred if either act had been reasonably observed. In this case appellees did stop, look and listen within twenty feet of the track. After stopping, looking and listening, he then proceeded on to the track at a speed of three to four miles an hour. Is thus required only five or six seconds to drive on the track in low gear. The inference from these facts is irresistible that appellee John Martin Souza was cautiously approaching the track. His view was distorted and limited because of the haze or mist. The silver color of the front of the engine made it blend with the mist and difficult to see. The train was making sixty-five or seventy miles an hour, which would make it travelling approximately ninety-seven feet a

second. Appellees had a right to expect that the Southern Pacific Company would give a signal as required by their rules and by the statutes of the State of California. John Martin Souza had no reason to assume that the train would be operated across Beckwith Road without the sounding of the whistle or bell being rung while he was exercising all the care and caution required of him. Appellee John Martin Souza, having stopped where he did and looked and listened under the circumstances appearing in the record, it is unreasonable to contend that as a matter of law he was guilty of contributory negligence for not stopping again at the track.

See:

Chesapeake & Ohio Ry. Co. v. Waid, 25 Fed. (2d) 366.

The Supreme Court of the State of California has stated that it is a question for the jury to determine as to whether or not the driver of an automobile was negligent in choosing the position he might stop in for the purpose of making an observation of railroad tracks.

“But the plaintiff’s choice of a position for observation is also a question for the jury.”

Nelson v. Southern Pacific Company, 8 Cal. (2d) 648.

This same Opinion holds that it is a question for the jury to determine under all the circumstances as to whether or not failing to look a second time in the direction from which the train approached constituted negligence on the part of the automobile driver.

“The presence of the train, on which there is much testimony and conflict with the plaintiffs, is a question for the jury as is also her conduct in failing to look again to her right, in the presence of what she considered to be a definite hazard on her left and in traversing a difficult crossing.”

Nelson v. S. P. Co. (supra).

Under the facts of this case, the driver John Martin Souza was crossing a main line track upon which trains operated in both directions so that danger could be anticipated from either side. In looking to his left the way that Beckwith Road crossed the track, it would be necessary for him to make almost a complete turn of his head and look over his shoulder. Also the roadway was but two lanes and there was some other traffic to be expected. Under these facts and with the swiftness with which the accident occurred following Appellee John Martin Souza's stopping, listening and looking, it is difficult to see how by sharp calculations of the time and speed it could be made out that he was guilty of contributory negligence as a matter of law. The California Supreme Court in *Nelson v. Southern Pacific Railroad Company* (supra) points out the error in such type of calculations.

“The testimony as to the giving of the statutory warning by bell and whistle is in direct conflict. The plaintiff testified she heard neither, that she was intent upon the train and engine to her left and upon the roadway which was rough. She travelled about 30 feet after passing track 2 before reaching the point of collision with the train on track 4. By a series of close calculations, it is argued that the train was visible if ordinary care

had been used in making the initial observation and the plaintiff's positive statement that she did not see it must be disregarded. The sum of these calculations, based in part on an estimate of the speed of the train given by the engineer, brings the train within the range of the plaintiff's vision by a margin of less than two seconds. It is obvious that even a slight error in an estimate of speed and distances would produce a totally different result. Such estimates and calculations do not therefore appear to us to be a sound basis on which to declare inherently improbable the plaintiff's positive statement that no train was visible for a quarter of a mile on a stretch of straight track."

In the case of *Hoffman v. Southern Pacific Company*, 101 Cal. App. 218, contributory negligence on the part of one attempting to cross a railroad track in a dense fog was held to be a question for the jury. In that case the automobile was not brought to a stop before going upon the tracks, the evidence being merely that as the driver approached the track he listened for the train and also looked. He neither heard the train, nor did he see it. Under such circumstances the Court stated the rule as to the determination of contributory negligence as follows:

"The test as to the existence of contributory negligence on the part of one who attempts to cross a railroad track ahead of an approaching train is the question as to whether under such circumstances a reasonably prudent person would have undertaken to do so. When the circumstances of a particular case are of such a nature that differ-

ent conclusions may reasonably be drawn as to the prudence of a person in attempting to cross a railroad track the question of contributory negligence becomes one for the determination of the jury. (*Murray v. Southern Pac. Co.*, 177 Cal. 1 (169 Pac. 675); *Whitney v. Northwestern Pac. Ry. Co.*, 39 Cal. App. 139 (178 Pac. 326); *Firth v. Southern Pacific Co.*, 44 Cal. App. 511 (186 Pac. 815); 41 A. L. R. 420, 424, note; 22 R. C. L. 1034, Sec. 267; 3 Elliott on Railroads, 358, Sec. 1167.)”

The United States Supreme Court in the case of *Pokora v. Wabash Railway Co.* (*supra*) collects a great number of crossing cases and very carefully distinguishes and overrules a portion of the case of *Baltimore & Ohio Ry. Co. v. Goodman*, 275 U. S. 66, and holds that the question of contributory negligence of the driver of an automobile attempting to cross a railroad track is one primarily for the jury where a situation is presented that is not commonplace or normal.

The evidence, as pointed out, clearly shows that appellee John Martin Souza did exercise care by stopping, looking and listening. The evidence shows that some care has been exercised, it is always a question for the determination of the jury as to whether or not the care actually exercised was due and sufficient.

“In the Koch case (*supra*, 148 Cal. 677) the Court declared (page 680): ‘Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question of whether or not the care actually exercised was

due and sufficient will always be a matter for determination by the jury.' ”

Toschi v. Christian, 24 Cal. (2d) 354.

From all the circumstances developed by the evidence in this case and the above law, it was clearly a question of fact to be determined by the jury whether or not appellant was guilty of negligence and whether or not appellee John Martin Souza was guilty of contributory negligence.

“Under the rule, too familiar to justify citing authorities, that a verdict cannot be instructed if there is any room for fair-minded men to doubt plaintiff’s contributory negligence, the Court below was justified in submitting this question to the jury.

“See, also, *B. & O. R. Co., v. Reeves* (CCA 6th) 10 F. (2) 329, 330; *Lehtohner v. N. Y., N. H., & H. R. Co.* (C. C. A. 2d) 188 F. 59; and *Penn. R. Co., v. Miller* (C. C. A. 3d) 99 F. 529.

“In the light of these authorities we think that the question as to whether the plaintiff was guilty of contributory negligence was clearly a question for the jury. As said by Mr. Justice Lamar, it is only where the facts are such that all reasonable men must draw the same conclusion from them that the question becomes one for the Court. Here the defendant was clearly guilty of gross negligence which resulted in plaintiff’s injury. Whether the plaintiff was guilty of contributory negligence was a question as to which reasonable men might differ and have differed. To direct a verdict against the plaintiff under such circum-

stances would be to deny him the right to a trial by jury which is guaranteed by the Constitution."

Chesapeake & O. Ry. Co. v. Waid, supra.

See, also:

Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 36 L. Ed. 485.

There being substantial evidence, as pointed out, upon which the jury based its verdict, and the questions presented by that testimony being questions of fact, the judgments entered upon the jury's verdict should not be disturbed by an Appellate Court.

(c) APPELLANT'S AUTHORITIES DISTINGUISHED.

An examination of the authorities relied upon by the appellant shows that the person driving upon a railroad track failed to stop or to look or to listen or else negligently chose a place to stop where his view was obstructed and failed to look after passing the obstruction. The principal case relied upon by appellant is the case of *B. & O. Ry. Co. v. Goodman*, 275 U. S. 66, 72 L. Ed. 167, 48 S. Ct. Rep. 24. That case is readily distinguished because the driver of the automobile in that case did not stop before driving upon the railroad tracks. The case of *Pokora v. Wabash Ry. Co.*, 292 U. S. 98, 54 S. C. 580, 78 L. Ed. 1149, 91 A. L. R. 1049, distinguishes and partially overrules the *Goodman* case.

In *Argo v. Southern Pacific Co.*, 39 C. A. (2d) 706, the driver of the automobile was killed, and the evi-

dence showed that he did not stop and look, nor did he listen for the approaching train. He drove directly onto the tracks at six miles an hour. Had he stopped to look he would have had a clear view for a mile.

Young v. Southern Pacific Co., 189 Cal. 746, presents a factual situation where the deceased operator of a motorcycle used no care at all. He failed to heed the warning of a stationary electric bell, and also the bell and whistle of the engine. A brakeman and a friend shouted at him, and yet he drove onto the tracks without stopping and looking.

The case of *Koster v. Southern Pacific Company*, 207 Cal. 753, has been modified by the later California cases, and is readily distinguished from the present factual situation the same as the foregoing cases. The driver did not stop before going upon the tracks and he could have at a safe distance where he would have had a view for 2000 feet. The morning was clear and the atmospheric conditions were good for visibility. The evidence showed the engine bell was ringing and the whistle was being sounded and the light was burning.

Again the same situation prevailed in *Shannon v. Northwestern Pacific R. Co.*, 209 Cal. 303. There the driver went on to the track without stopping. Had he stopped, he would have had a clear view for three hundred to four hundred feet, or had he looked, he could have seen the train.

In *California Rendering Co. v. Pacific Electric Ry. Co.*, 205 Cal. 73, upon which appellant relies heavily,

the evidence showed that the driver negligently stopped where his view was obstructed by trees and consequently his view was limited to three hundred feet. The trees were thirty-two feet from the track and had he exercised reasonable care and gone just a few feet past the trees to stop, look and listen, his view would have been unobstructed. Further, the wig-wag signal was in operation to warn of the train's approach.

The same circumstances were present in *Stephenson v. Northwestern Pacific R. Co.*, 208 Cal. 749; the driver carelessly stopped where his view was obstructed. Light conditions were pretty good, and after he passed the obstruction, had he looked, he could have seen in excess of four hundred feet.

The above authorities are the ones most relied upon by appellant. They deal with situations where a person about to cross a railroad track did not stop and look, or did not look or listen; and situations where the person negligently stopped and looked from a position where the view was obstructed and then carelessly failed to look again after passing the obstruction; where if he had, he would have had a clear view of the approaching train.

These conditions are not present here. John Martin Souza carefully stopped at a point where nothing obstructed his view. Had it not been for the haze or mist that prevailed the morning of the accident, plus his having to look through it into the run which distorted his view, the accident in all probability would not have happened. He stopped at a point where there

were no buildings or trees to obstruct his view, so it cannot be said that his view was limited because of the point where he chose to stop and look. Whether he stopped further ahead or back would have made no difference as far as his view was concerned because of the prevailing weather conditions and location of the sun. There is also the fact to be considered that the front of the engine was silver which made it blend with the haze or mist. To argue that it was silver to make it more visible is well and good under ordinary conditions; but, and this is not meant to be facetious, a golf ball is white for visibility, but certainly it would be hard to find or see in a snow bank.

(d) THE CONTRIBUTORY NEGLIGENCE OF THE DRIVER JOHN MARTIN SOUZA IS IMPUTED TO HIS FATHER AS A MATTER OF LAW IS A MOOT CONTROVERSY.

There is no question that the California law is that the negligence of a minor who operates a vehicle upon the highways of the State of California with the permission of the father, is to be imputed to the father. (Calif. Vehicle Code S. 353(6)).

Had the jury found negligence upon the part of John Martin Souza, which proximately contributed to the accident, that negligence would be imputed to the father Antonio Souza, deceased, as a matter of law. However, the jury by its verdict found that John Martin Souza, was not negligent, so there was no need at all for the jury to consider the question of the imputation of negligence to Antonio Souza, de-

ceased. Certainly, in no event could any alleged contributory negligence on the part of the driver, John Martin Souza, be imputed to decedent, Edward Anthony Souza, so as to effect the rights of his surviving widow, Geraldine Souza, and their surviving children. The whole question is moot because of the finding of the jury.

Further, appellant does not point out, where or how it was prejudiced by the Court instructing the jury in such a way as to permit them to find as a fact whether or not John Martin Souza was driving with the consent of his father, Antonio Souza.

The Court as a matter of law could have corrected any verdict.

(e) **THE COURT CLEARLY INSTRUCTED THE JURY THAT APPELLEE JOHN MARTIN SOUZA HAD THE RIGHT TO ASSUME THAT APPELLANT WOULD OBEY THE LAW.**

The appellees requested and the Court instructed the jury as follows:

“You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution as required by law.”

This instruction does no more than state the law as contained in Section 1963, Subdivision 33 of the Cali-

California Code of Civil Procedure. That section provides that there is a presumption that the law has been obeyed. The above instruction simply told the jury that if a person is exercising ordinary care, such person has the right to assume that those in charge of an engine would obey the law and he had a right to rely upon this assumption until he had notice to the contrary. This has long been the established rule.

“The engine bell was not rung as required by Section 486 of the Civil Code. This must be assumed in this Court because there was testimony to that effect. Nor can it be presumed, as against the verdict, that the noise of plaintiff’s wagon, as his horses were proceeding upon ‘a slow trot’, would have prevented his hearing the bell had the bell been ringing. Plaintiff had a right to rely upon the performance by those on the locomotive of every act imposed by law upon them when approaching the crossing.”

Strong v. Sacramento & Placerville R. R. Co.
(1882), 61 Cal. 326.

The rule is clearly stated in California Jurisprudence where a great number of cases are collected.

“One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another.”

19 Cal. Juris. 596, Sec. 35, Negligence.

This rule has been followed consistently throughout the decisions.

“The appellant further contends that even if it is shown that he was negligent, the evidence also shows that plaintiff was equally negligent in crossing the street as she did. The contention is without merit. ‘The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.’ (29 Cyc. 516; *Medlin v. Spazier*, 23 C.A. 242 (137 P. 1078).) Such person must, of course, himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own conduct at the same time.”

Harris v. Johnson, 174 Cal. 55.

The above rule was followed exactly in preparing the instruction complained of, as it first told the jury that the person relying upon the assumption that the law would be obeyed must be in the exercise of ordinary care and caution himself. Whether or not plaintiff was in the exercise of ordinary care and caution so that he could rely upon the assumption was a question of fact for the jury.

“The Court also instructed the jury: ‘I instruct you that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.’

“While this is also a general rule, it should have also been qualified under the circumstances of this particular case. The rule does not apply to ‘every person’ but applies to one who is himself not negligent. (19 Cal. Jur. 596 and cases there cited.) Reliance upon this presumption will not excuse one who is himself negligent, for such a rule would abrogate the doctrine of contributory negligence. (*McPherson v. Walling*, 58 Cal. App. 563 (209 Pac. 209).)

“A person may not blindly rely upon the unaided care of another, but must use reasonable care to observe the conduct of such other person, so far as this may affect his own safety. (*Simonsen v. L. J. Christopher*, 186 Cal. 786 (200 Pac. 615); *Harris v. Johnson*, 174 Cal. 55 (Ann. Cas. 1918E, 560, L.R.A. 1917C, 477, 161 Pac. 1155).) Whether or not reasonable care is used under the circumstances, in relying upon this presumption, is a question for the jury. (*Mann v. Scott*, 180 Cal. 550 (182 Pac. 281, 282); *Scott v. San Bernardino Valley Co.*, 152 Cal. 604 (93 Pac. 677).)”

White v. Davis, 103 C.A. 531, at 545.

This rule was again followed in the case of *Dickinson v. Pacific Greyhound Lines*, 55 C.A. (2d) 824, where the Court states:

“The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.

(Harris v. Johnson, (1916) 174 Cal. 55, 58 (161 P. 1155, Ann. Cas. 1918E, 560, L.R.A. 1917C, 477); Medlin v. Spazier, (1913) 23 Cal. App. 242, 245 (137 P. 1078), quoting from 29 Cyc. 516.) Whether reaasonable care is used under the circumstances in any particular case in relying upon the presumption is a question for the jury. (White v. Davis (1930) 103 Cal. App. 531, 545 (284 P. 1086).)''

Under the foregoing law it is clearly apparent that the instruction given by the Court to the jury was a correct statement of the law. It told the jury that when a person approaches a railroad crossing and exercises ordinary care and caution himself, that is, if he is not negligent himself, he has the right then to rely upon the presumption that those operating the train will obey the law, unless in the exercise of ordinary care, he is informed to the contrary.

See also

Chesapeake & Ohio Ry. Co. v. Waid (supra).

Appellee John Martin Souza testified that he stopped, looked and listened. This testimony was corroborated in effect by the testimony of the fireman on the engine, who testified as follows:

“Q. (of Mr. Johnson) Did you see the automobile before the accident happened?

A. Yes, I saw it as it came up to the tracks.

Q. As it came up to the tracks was it traveling on this road we have just talked about? We can stipulate it was Beckwith Road, can we not?

Mr. Dunne. That is right.

Mr. Myers. Q. It was on this particular crossing when you saw it, was it?

A. Yes.

Q. Was it on your side of the locomotive?

A. Yes.

Q. At that time your locomotive was northbound to the layman, but I suppose you railroad men would call it westbound?

A. Westbound.

Q. In other words, going towards San Francisco?

A. Going towards Sacramento.

Q. Where was this automobile with reference to the tracks that your engine was traveling on when you first saw it?

A. Well, I saw it pull up, but the car was going slow; it looked like it was stopped, and I thought it was going to stop but evidently it didn't, and the next time I noticed it, why, it looked like it was going to be in front of the locomotive, so, of course, by then we were right on top of it and I yelled for an emergency stop to the engineer, and it was too late.

Q. Now, at any time did you see that automobile at a stop? Did you see that automobile at any time at a stop?

A. Well, it was kind of hard to judge. It looked like it was stopped; it wasn't going very fast. I don't say it was going over between five and ten miles an hour, and of course we were going pretty fast and it is hard to judge.

Q. How far was it from the tracks when you saw it?

A. Well, I saw it pull up and, well—where the post is, where the warning post is, I would say it was around there, and it looked like it was stopped, but evidently was not.

Q. You say it looked like it was stopped?

A. Yes. I couldn't say for sure, but it wasn't going very fast, I know.

Q. How many feet would you say it was from the crossing?

A. Oh, I would say somewhere around 200 or 250.

Q. I mean the automobile, how many feet from the crossing was the automobile, would you say?

A. Oh, I would say around 15, 10 or 15 feet.

Q. All right, at that time where was the locomotive with reference to the line of travel of this automobile on Beckwith Road, how far away was it?

A. Somewhere around 200 feet."

(T.R. pages 423, 424 and 425.)

"Q. Now, when the engine was about 200 feet from the crossing, going at the speed that you have said that it was going, can you tell us whether or not the whistle was blowing or the bell ringing at that time?

A. There was no whistle. He might have blowed the whistle after we hit the car, I don't know, don't recall. I was nervous.

Q. But up to the time of the collision——

A. No, there was no whistle.

Q. How about the bell, was any bell ringing?

A. Well, there might have been a bell afterwards, but I turned the valve on and the bell didn't ring. I saw the car—I thought the car was stopped, and it wasn't necessary to use the hand cord."

(T.R. pages 425, 426.)

Under all of the evidence produced by appellees, it was clear that the jury could find that appellee John

Martin Souza was in the exercise of ordinary care and caution and was therefore entitled to rely upon the presumption that the persons in charge of the Southern Pacific Company engine would obey the law. In addition, the Court fully instructed as to the duties imposed upon John Martin Souza, the driver of the automobile. (T. R. page 380.) This instruction immediately follows the one complained of and fully sets out the duty of care and caution imposed upon a person about to cross a railroad track. Reading these two instructions together it is clear that the Court fully and accurately instructed the jury with reference to the relative rights of the driver of an automobile and the operator of an engine.

In connection with this assignment of error appellant has complained that there was error committed by the Court in its failure to give to the jury appellant's instruction No. 27. This instruction clearly violates the rule previously set out in that it does not state, first, that the persons in charge of the engine must themselves be in the exercise of ordinary care and caution before they can rely upon the presumption that others will obey the law in attempting to cross the railroad tracks in front of them. Furthermore, all of the other subjects contained in the refused instruction were covered by other instructions given by the Court. (T. R. pages 380, 381, 382 and 383.) It is submitted that the defense instruction No. 27 proposed by appellants was erroneously drawn and that the main subject matter of the said instruction was completely covered by instructions that were given to the jury by the trial Court.

(f) THE QUESTION OF JOINT VENTURE IS MOOT.

Appellant contends that the Court should have given its instruction No. 38, which would have permitted the jury to determine the question as to whether or not John Martin Souza, his brother and his father were engaged in a joint venture or enterprise. (Instruction No. 38. T. R. page 447.)

There was no evidence in the record from which the jury could find that the appellees were engaged in a joint enterprise. There was no evidence of a community of interest in the object of the undertaking, an equal right to direct and govern the conduct of each other, share in the losses, or divide profits. These are some of the necessary elements of a joint enterprise.

Larson v. Lewis-Simas-Jones Co., 29 C.A. (2d) 83, 84 P. (2d) 296;

Wiltsee v. Calif. Emp. Com., 69 C.A. (2d) 120, 156 P. (2d) 612.

Besides, the jury by its verdict found that the occupants of the automobile and the driver were without fault, and there was therefore no need for the jury to consider the question of joint enterprise, if it was proper.

The question consequently is moot.

(g) APPELLANT'S PROPOSED INSTRUCTIONS 56, 58 AND 58-A WERE PROPERLY REFUSED BY THE TRIAL COURT.

Appellant's instruction No. 56 (T. R. page 448) was covered fully by other instructions given by the Court. The following instruction covers most of the ground:

"You are instructed that it is as much negligence to fail to see that which can be seen by the exercise of ordinary care, as it is negligence not to look at all."

(T. R. page 375.) (See also Instruction T. R. pages 378 and 379.)

Whether or not John Martin Souza, or the occupants of the car should or could have seen the approaching train in the exercise of ordinary care under the prevailing atmospheric conditions and the location of the sun was a question to be determined by the jury. The view was distorted and limited looking into the sun. The engine front was silver in color and it was traveling at a high rate of speed. There was the ever-present danger of a train coming from the opposite direction.

Appellant's instruction No. 58 (T. R. page 449) is on the same subject and is covered by other instructions given by the Court. (T. R. pages 375, 378, 379.)

The trial Court's refusal to give appellant's instruction No. 58-A (T. R. page 449) was not erroneous. It was completely covered by the following two instructions that were given:

"However, the driver and each of the passengers in the automobile was under a continuing duty

to exercise reasonable care for his own safety at all times.”

(T.R. page 380.)

“A railroad locomotive which is in plain view operating along a railroad track and toward a highway crossing at grade is itself a warning of danger without any other sign or signal or warning and any person in an automobile approaching the crossing, whether driver or passenger, is under a duty to exercise reasonable care to observe and heed that warning, whether other warnings or signals are given or not.”

(T. R. page 382.)

It is submitted that the Court fully and properly instructed the jury when all of the instructions are read as a whole.

It serves no purpose to single out an instruction here and there and complain because it was not given or that there was some technical omission. The law is firmly settled that the instructions are to be read as a whole and if they fully and fairly instruct the jury, there is no error of a prejudicial nature.

The language used in *Brown v. Luster*, 165 Fed. (2d) 181, is particularly applicable here. It is stated in that case:

“* * * In such a benign climate, an Appellate Court cannot use an apothecary’s scale to determine the precise minimum of evidence that was necessary to support the jury’s verdict. Nor should we scrutinize the judge’s instructions with a microscope, to spy out technical peccadillos.

“Reading the record as a whole, we are satisfied that the Court below committed no reversible error, and that substantial justice has been done.”

CONCLUSION.

Appellant has endeavored in his brief to present this case to this Court as though arguing to a jury. Appellant is endeavoring to have this Court pass upon the credibility of witnesses, resolve contradictions in its favor and draw inferences favorable to it. This, of course, is all contrary to established law. There is substantial evidence in this record as pointed out heretofore that the Southern Pacific Company was negligent in the operation of the engine involved in the accident in that it failed to sound its bell or whistle as required by law. This established a *prima facie* charge of negligence.

There is substantial evidence in the record, as shown by the testimony set out in this brief, that plaintiff stopped, looked and listened and that he exercised care and caution as he attempted to cross the railroad track.

Under the circumstances, where his vision was limited by the mist or haze and distorted by the position of the sun, the law as established by the Federal Courts and the law of the State of California holds that it is a question for the jury as to whether or not a person approaching a crossing under such conditions exercised ordinary care in selecting the

place to stop and look and in looking and in failing to look the second time in the direction from which the engine approached. Appellant overlooks the fact that John Martin Souza of necessity had to look also to his left as trains traveled in both directions on the track involved in this accident, and that also some attention had to be paid to the roadway upon which he was traveling for there was always the problem of highway traffic.

In view of all the testimony, the law, as heretofore pointed out, clearly holds that it was for the jury to determine the questions of negligence and contributory negligence.

We have pointed out wherein the authorities relied upon by appellant are not applicable under the circumstances here developed. Those cases dealing with situations where the driver negligently selected a place to look where his vision was obstructed and then failed to look again after leaving the point he negligently selected when he would have had a clear view had such person looked again, or cases where the person approaching the railroad track failed to look at all, failed to listen or failed to stop.

We have already pointed out that any question of contributory negligence on the part of the appellee John Martin Souza which might be imputed to the father, Antonio Azevedo Souza, became moot upon the jury's finding a verdict in favor of the appellee John Martin Souza. That question being moot, certainly there is no contributory negligence to be im-

puted to the father, Antonio Azevedo Souza, and in no event could any negligence on the part of appellee John Martin Souza be imputed to the decedent, Edward Anthony Souza, so as to affect the rights of his surviving widow Geraldine Souza, and their minor children, as he was a passenger in the car, exercising no control over its management or operation and was not a party to a joint venture. These contentions have been completely nullified by the evidence and the law.

It is respectfully submitted that the issues of this case were submitted to the jury under proper instructions and in accordance with well established law and that said judgment should therefore be affirmed.

Dated, Oakland, California,
August 30, 1949.

Respectfully submitted,
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No. 12,153

IN THE

United States
Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, et al.,

Appellees.

Appellant's Reply Brief

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SUBJECT INDEX

	Page
I. The Facts	1
II. The Automobile Driver Was Guilty of Negligence as Matter of Law	6
III. The Negligence of the Driver Is Imputed to His Father and Brother	14
IV. There Was Error in the Charge.....	16
Conclusion	17

TABLE OF AUTHORITIES CITED

CASES

	Pages
Chesapeake & O. Ry. Co. v. Waid, 14 F2d 90 and 25 F2d 366 (CCA 4)	12, 13
Coleman v. Calif. etc. Church, 27 CA2d 579, 83 P2d 469.....	16
Collins v. Graves, 17 CA2d 288, 61 P2d 1198.....	16
Crawford v. S. P. Co., 3 C2d 427, 45 P2d 183.....	10
Dickinson v. Pac. Greyhound Lines, 55 CA2d 824, 131 P2d 401	9
Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.ed. 1188.....	6
Grand Trunk Ry. Co. v. Ives, 144 U.S. 408, 36 L.ed. 485.....	12
Gregg v. W. P. R. Co., 193 Cal. 212, 223 Pac. 546.....	10
Green v. So. Cal. Ry. Co., 131 Cal. 1, 70 Pac. 926.....	15
Griffin v. San Pedro R. Co., 170 Cal. 772, 151 Pac. 282.....	7, 8
Gundry v. Atchison etc. Co., 104 Cal. App. 753, 286 Pac. 718	10n
Harris v. Johnston, 174 Cal. 55, 161 Pac. 1155.....	8
Heilman v. E. P. Ry. Co., 10 Cal. App. 397, 102 Pac. 15.....	15
Hoffman v. S. P. Co., 101 Cal. App. 218, 281 Pac. 681.....	11
Hutson v. So. Cal. Ry. Co., 150 Cal. 701, 89 Pac. 1093.....	7
Jones v. S. P. Co., 34 Cal. App. 629, 168 Pac. 586.....	10n
Kilmer v. Norfolk & W. Ry. Co., 45 F2d 532 (CCA 4— cert. den.)	13
Koch v. So. Cal. Ry. Co., 148 Cal. 677, 84 Pac. 176.....	7, 10n
Koster v. S. P. Co., 207 Cal. 753, 279 Pac. 788.....	8
Larrabee v. W. P. Ry. Co., 173 Cal. 743, 160 Pac. 257.....	7, 8
Marino v. S. P. Co., 201 Cal. 392, 257 Pac. 74.....	10n
Nelson v. S. P. Co., 8 C2d 648, 67 Pac. 682.....	11, 13

TABLE OF AUTHORITIES CITED

iii

Pages

Peri v. L. A. Junction Ry. Co., 22 C2d 111, 137 P2d 441.....	10
Pokora v. Wabash Ry. Co., 292 U.S. 98, 78 L.ed. 1149.....	12
Scarborough v. Urgo, 191 Cal. 341, 216 Pac. 584.....	2
Sheets v. S. P. Co., 212 Cal. 509, 299 Pac. 71.....	10n
S. P. Co. v. Day, 38 F2d 958 (CCA 9).....	8, 10n, 13
Stoner v. N. Y. etc. Co., 311 U.S. 464, 85 L.ed. 284.....	6
Strong v. Sacramento etc. Co., 61 Cal. 326.....	8
Thomas v. Visalia E. R. Co., 169 Cal. 658, 147 Pac. 972.....	2
Toschi v. Christian, 24 C2d 354, 149 P2d 848.....	11
Vaca v. S. P. Co., 91 Cal. App. 470, 267 Pac. 346.....	10n
White v. Davis, 103 Cal. App. 531, 284 Pac. 1086.....	8

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Appellant's Reply Brief

I.

THE FACTS

Appellees say that we have overlooked the rule that conflicts must be resolved in favor of the party successful below and for this reason it is necessary to restate the facts.

We have not overlooked the rule but the rule is only one of two rules. When the question is the sufficiency of the evidence to sustain the judgment conflicts must be resolved for the party successful below. But when the question is the propriety of the charge the appellant who

claims error in giving or refusal of instructions is entitled to present the evidence which supports **his** theory for he is entitled to instructions on so much of his theory of the case as is supported by **any** evidence (*Thomas v. Visalia E. R. Co.*, 169 Cal. 658, 661, 147 Pac. 972; *Scarborough v. Urgo*, 191 Cal. 341, 347, 216 Pac. 584). We stated the evidence for appellees' theory, and argued the sufficiency of the evidence on that. But to orienting our claim of error in the charge we also stated other evidence.

Examination of appellees' statement of the facts shows that we omitted nothing of significance. Appellees have not corrected or undertaken to correct any of our statements. To the contrary, there are matters in appellees' statement which may not seem of great significance as the statement is read, but which go to the heart of their attempt to excuse the conduct of the automobile driver, John, and which call for correction.

The attempt to excuse the driver's conduct is the claim that weather conditions limited and distorted his view in the direction from which the locomotive approached because he looked into the sun in that direction (Appellees' Brief, p. 13). The claim involves the direction of the automobile, the position of the sun and the claimed restriction of vision.

First, the direction of the automobile: Appellees state that Beckwith Road extends in a general **northeasterly** and southwesterly direction (p. 5) and that the automobile, as it approached the track, was going northeasterly (p. 6). This is an attempt to lay a basis for the claim that when John looked 45° to his right, toward the locomotive, he was looking east into the sun. The diagrams, Court's Exhibits 1 and 2 (our brief opposite p. 6; R. 89, 90),

demonstrate that Beckwith Road runs east and west. There was no attempt to dispute the accuracy of these diagrams. To the contrary, John the driver testified he “proceeded easterly on Beckwith Road” (R. 102), not “in a northeasterly direction” as stated by appellees.

The sun was several hours above the horizon—at 9:00 a.m. at least half way to the meridian. It was in the sky “at an angle”. With reference to the direction in which John was driving it was, so he said, “directly, just about directly east of me, maybe a little bit south” (R. 104). Appellees claim that “the position of the sun as appellee John Martin Souza looked to his right had a tendency to distort his vision.” His testimony (R. 105) falls short of this. This is his only testimony on this subject:

“Q. Was your vision affected with reference to the direction you looked? What I mean by that, was there any difference in looking toward the sun or away from the sun?

A. Well, it **naturally**¹ would distort my vision.

Q. Looking in what direction?

A. **When I looked right directly on the sun.**

Q. When you looked to the left, how about that?

A. The sun wouldn't hinder me when I looked to my left.” (R. 105)

When John looked to his right, if he did look to his right, toward the locomotive, **he did not look “right directly on the sun”**. The sun was up in the heavens. When he looked down the track he looked away from it 45° to the left of his line of vision.

1. He is arguing and reasoning, not stating an observation. He is stating only what anyone knows. If you “look toward the sun” it affects vision.

This matter may be a little one—indeed it is—but it is about the only little thing that is offered to excuse John's conduct.

The second attempt, connected with this, is to make out a mist or haze which limited vision to 600 feet. The testimony by Davis is dealt with in our opening brief (p. 33 note 29) and demonstrates that no mist or haze can provide any excuse for John's conduct. Appellees now repudiate their witness Davis by silently ignoring him. This leaves as the only testimony to support their claim, and the only testimony upon which they rely, the testimony of John Souza and Traffic Officer Hansen.

John Souza's testimony was not that his vision down the track was restricted to 600 feet but only that he could not see "clearly" more than an estimated 600 feet. His testimony was: "There was sort of a haze hanging low and I couldn't see any more than about 200 yards down the track, **got no clear view**" (R. 104). When asked how he fixed the distance, "I just guessed it. That is just an estimation" (R. 144). He claimed the bottom of a band of mist was about 5 feet above the ground (R. 146, 148), said he could see ahead **under** it about 600 feet and when he looked **through** it could see "about the same" (R. 147). If this is to be believed the mist or haze was a negative quantity. On redirect examination his counsel came back to this and in answer to the question how far down the track he "had an **unimpaired** vision" he said he would say he could see "about 600 feet" (R. 157).

Hansen's testimony is referred to for the proposition that the haze was an ordinary haze and limited visibility "from two hundred feet to one thousand feet depending upon what you were looking **toward**" (Appellees' Brief

p. 7). This would leave the impression that Hansen intended to say that if you were looking toward the sun visibility was less than 1,000 feet. Hansen's testimony will not support any conclusion. We quote his full testimony on the subject, given on direct examination as a witness for appellees:

"Q. When you came to the scene of the accident, from what direction did you come?

A. I came from Modesto. That would be traveling in a northerly direction.

Q. Do you recall what kind of a morning this was, that is, whether it was a clear morning or just what the weather conditions were?

A. Yes, it was a characteristic morning for that time of the year. **It was what would ordinarily be considered clear.** There was a light haze hanging in the atmosphere, but nothing that would be considered out of the ordinary.

Q. How far would you say your visibility would extend, having in mind the condition of this light haze that you say was hanging in the atmosphere?

A. It would depend upon what you were looking at. It might extend 200 feet for one **object** and a thousand feet for **another**.

Q. That would depend upon the condition of the haze at that particular point, is that right?

A. **It would depend also upon the object that you were looking at, color, shape, size, and so forth.**"
(R. 161, 162)

Hansen did not make his testimony on range of visibility depend on geographical direction but on the object looked at. His testimony will not support the proposition that there was atmospheric interference with the visibility. His testimony was that the range of visibility depended "on

the object that you were looking at, color, shape, size, and so forth." This, of course, is true in the broadest daylight and states only the very elementary proposition demonstrated in nature in protective coloring of birds and animals and in warfare in uniforms and colors which blend into the surroundings.

Finally, in an offhand way, appellees suggest that the roadway was but two lanes and that there was some other traffic to be expected (Appellees' Brief p. 20). Well, an automobile needs only one lane. Whether there was one or six lanes is beside the point when, as is demonstrated here, the view beyond the lanes and to the right and toward the locomotive was unobstructed. There is no evidence of any other highway traffic. There is not the slightest suggestion that John had his attention distracted for so much as a second by any moving object.

II.

THE AUTOMOBILE DRIVER WAS GUILTY OF NEGLIGENCE AS MATTER OF LAW

This action involves no federal question. Jurisdiction is based on diversity of citizenship. Matters of substantive right are governed by the law of California (*Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.ed. 1188). The rule of the *Tompkins Case* applies to negligence and contributory negligence—the *Tompkins Case* was such a case—and within the rule the sufficiency of the evidence is a matter of substance governed by State rules (*Stoner v. N. Y. etc. Co.*, 311 U.S. 464, 85 L.ed. 284).

In discussing instructions appellees argue that the automobile driver could assume that those in charge of the

locomotive would obey the law. **This is not the California rule in railroad grade crossing cases.** The cases are cited at p. 31 of our brief. They make clear that the railroad crossing cases are a distinct class; that "a railroad crossing is itself a place of danger and is an effectual warning of danger, a warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company itself to exercise reasonable care." (*Koch v. So. Cal. Ry. Co.*, 148 Cal. 677, 84 Pac. 176.)

"The rule is simply this: That a railroad crossing from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him upon the assumption that care will be exercised in the operation of the train. * * * 'There are instances where as matter of law it is negligence not to anticipate negligence in others.' " (*Hutson v. So. Cal. Ry. Co.*, 150 Cal. 701, 89 Pac. 1093.)²

2. The court added:

"As, for instance, it is well settled in the Federal Courts that it is negligence for a highway traveler not to anticipate failure on the part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals. This is in accord with the doctrine of the Supreme Court of the United States as laid down in *Railroad Co. v. Houston*, 95 U.S. 697, where it is said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger.' "

In *Griffin v. San Pedro R. Co.*, 170 Cal. 772, 151 Pac. 282, the court said the traveler could not rely upon "a custom or even a duty enjoined by law, to give signals."

Larrabee v. W. P. Ry. Co., 173 Cal. 743, 161 Pac. 257, reinvestigated the rule *de novo* and reaffirmed the rule established by the California cases. It expressly disapproved *Strong v. Sacramento etc. Co.*, 61 Cal. 326, relied upon by appellees. The court said:

“The statements in *Strong v. Sacramento & Placer-ville R. R. Co.*, 61 Cal. 326, and in *Whalen v. Arcata & Mad River R. Co.*, 92 Cal. 669 [88 Pac. 833], to the effect that the deceased had the right to rely upon the ‘performance by those on the locomotive of every act imposed by law upon them when approaching a crossing’ cannot be considered to be the law of this state as affecting the rights and duties of one about to venture to make a railroad crossing. Such a one is not entitled to rely upon such a performance of duty so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see.”

The California cases were reviewed, the *Griffin Case*, note 2 above, was quoted with approval and the language from the *Larrabee Case*, disapproving the *Strong Case*, was quoted with approval in *Koster v. S. P. Co.*, 207 Cal. 753, 764, 765, 279 Pac. 788. See also reviewing the California cases, and holding that “the negligence of the railroad company in failing to give crossing signals required by law does not justify the person crossing the track in omitting precautions which would otherwise be required of him”, the decision of this court in *S. P. Co. v. Day*, 38 F2d 958.

Except for the repudiated *Strong Case* none of the California cases cited by appellees were railroad crossing cases. *Harris v. Johnston*, 174 Cal. 55, 161 Pac. 1155; *White v. Davis*, 103 Cal. App. 531, 545, 284 Pac. 1086;

Dickinson v. Pac. Greyhound Lines, 55 CA2d 824, 131 P2d 401, are all highway accident cases—motor vehicle collisions or motor vehicles striking a pedestrian. None remotely suggests modification of the railroad crossing rule. There is no element in any comparable with the elements present in a railroad crossing case, i.e., a track which is itself a warning of danger that heavy trains traveling at high speed and which cannot be stopped as can an automobile may approach at any time and the consequent settled rule of law that the railroad operation has the right of way to which the automobile is bound to yield (see our brief pp. 20, 21).

While this bears on the question of error in instructions it is worth noticing here that it is equally well established that the rule is just the contrary for the operators of the train—they are entitled to assume the highway traveler will keep out of the way of the train whether signals have been sounded or not. Appellees' argument in this regard is no more than a bland disregard of the settled California rule. The cases are set out in our brief, pp. 47 and following.

Nothing better could support the claim of Souza's contributory negligence as matter of law than an examination of the cases appellees cite for the proposition that this question is for the jury. The unusual and extraordinary facts of each as compared to this case of a wide open country crossing in daylight, and the difficulty that the courts had in finding ground in those cases for letting the case go to the jury, speak volumes.

In California there is a settled distinction between "guarded crossings" where the railroad has installed fixed protection which fails to operate—a wig-wag or

other automatic signal that does not work, gates that are not closed or a flagman who is not functioning properly³—and an unguarded country crossing as here. The court first made this distinction clear in *Gregg v. W. P. R. Co.*, 193 Cal. 212, 217, 223 Pac. 546, holding that the railroad, by installing protection, cannot encourage the public to relax in reliance on the protection; can not, in effect, invite the traveler onto the crossing by failing to have the protection work and then hold the traveler to the care required as at an unguarded country crossing where there was no element of entrapment. This distinction has been consistent in the California cases.⁴ Even so, the relaxed rule is applied only where there are other elements excusing want of care.⁵

We now turn to the cases appellees cite.

Peri v. L. A. Junction Ry. Co., 22 C2d 111, 137 P2d 441, was a very peculiar guarded crossing case. The plaintiffs were passengers in an automobile operated by one Guida. It was a dark night, there was no artificial light, there was a heavy fog and visibility was limited to from 5 to 10 feet for dark objects and from 35 to 50 feet for lighted

3. And even here there is a limit as this court demonstrated in *S. P. Co. v. Day*, above.

4. See *Marino v. S. P. Co.*, 201 Cal. 392, 257 Pac. 74; *Crawford v. S. P. Co.*, 3 C.2d 427, 45 P.2d 183; *Sheets v. S. P. Co.*, 212 Cal. 509, 299 Pac. 71; *Vaca v. S. P. Co.*, 91 Cal. App. 470, 267 Pac. 346.

5. For cases holding the driver was guilty of contributory negligence in spite of the failure of crossing signals to operate see in addition to *S. P. Co. v. Day* above, *Koch v. So. Cal. Ry. Co.*, 148 Cal. 677, 84 Pac. 176; *Jones v. S. P. Co.*, 34 Cal. App. 629, 168 Pac. 586; *Gundry v. Atchison etc. Co.*, 104 Cal. App. 753, 286 Pac. 718.

objects. The crossing protection was not operating. In addition, since the plaintiffs were passengers and Guida's negligence was not imputed to them, it was necessary to make out not only that Guida was negligent but that his negligence was the sole proximate cause of the accident. It was held that this double burden had not been carried as matter of law. It is difficult to see how the court could have held differently. The case is no authority here.

Toschi v. Christian, 24 C2d 354, 149 P2d 848, was another guarded crossing case with additional elements. The city street, on which the truck was approaching until just before it turned onto the track, and the track were so located that the backing locomotive was coming from behind the truck driver. In addition there was evidence that the flagman on the crossing not only was not signalling the approach of the locomotive but with a mirror was shining the sun's reflection in the eyes of the truck driver.

Hoffman v. S. P. Co., 101 Cal. App. 218, 281 Pac. 681, reversed a judgment for the plaintiff. As in the *Toschi Case* until just before the automobile turned onto the track "the train was approaching from their rear." There was a "dense fog". When the automobile was 5 or 6 feet from the nearest rail "suddenly the headlight of the approaching engine appeared through the fog about 100 feet away. The train was rapidly bearing down on them."

In *Nelson v. S. P. Co.*, 8 C2d 648, 67 P2d 682, a woman driver approached five sets of tracks, stopped 8 feet from the first, saw nothing to her right and saw a freight train to her left. She waited for this to pass and then started across. As she crossed she saw a locomotive operating to her left and it necessarily required her attention. In addition, the crossing was rough. In the circumstances her

conduct was for the jury "in the presence of what she considered to be a definite hazard to her left and in traversing a difficult crossing".

In *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 78 L.ed. 1149, the view of the driver of the motor vehicle, in the direction from which the train came, was blocked by standing cars on the next track so when his vehicle moved far enough for him, behind the wheel, to see along the track, the front of his vehicle, out in front of him, was already in the path of the "overhang" of the train which struck it.

In *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 36 L.ed. 485, the accident happened at a city crossing where the tracks and road were so located that the tracks curved "away from a person coming down the Holden Road." There were "trees and a willow, a short distance from the line of the right of way" so that "it was not until a traveler was within 15 or 20 feet of the track, and then going up the grade, that he could get an unobstructed view". One witness testified it was necessary to be within 8 feet of the track. The horse and buggy were driven on the track while the ability to hear was still interfered with by a train that had just passed and apparently the driver's attention was on this train at the time of the accident.

The court in *Chesapeake & O. Ry. Co. v. Waid*, 25 F2d 366 (CCA 4) for the facts, refers to its earlier opinion in 14 F2d 90. From the two opinions it appears that the traveler was struck by cars which were being shoved without light or signal. The driver testified "that it was so dark at the time of the collision that he could not see the approaching cars"; that the crossing was narrow and difficult so that "you had to hit it just right or the wheels would miss it and go down between the rails". In addition

there was a locomotive with a lighted headlight to his left (the cars came from the right) to which he was required to give, and did give, attention. The holding adds nothing to the *Nelson Case* above. The court which decided the *Waid Case* declined to follow it in *Kilmer v. Norfolk & W. Ry. Co.*, 45 F2d 532 (CCA 4—cert. den. 283 U.S. 824, 75 L.ed. 1438).

The significant elements, excusing failure of the driver to see the approaching train, in each of the cases cited by appellees, are wanting in this case. This was an unguarded crossing. There was no element of entrapment. The defendant did nothing to induce the driver to relax his vigilance. There was no highway traffic which required the driver's attention or which distracted him even if it did not require his attention. There was no other railroad traffic. There was no possibility of other traffic. This was a single track main line railroad. There was nothing in the physical condition of the crossing that required exceptional care or attention in order to operate over the crossing.

Whatever the rule may be in other jurisdictions it is the rule in California that it was the duty of the driver not only to look once but to continue looking. (Our brief p. 26 and cf. *S. P. Co. v. Day*, above.)

If the plaintiff's story is to be believed he stopped 20 feet from the track, looked to his right and left, started on and never looked again. As he started he was driving practically head-on into the approaching locomotive. It is difficult to know how he avoided seeing it. He was in low gear and claims to have been going only 3 or 4 miles an hour. In low gear he readily could have increased his speed to at least 10 or 15 miles an hour. At 3 or 4 miles an hour he could have stopped instantly. At any time

from the time he started, 20 feet from the track, until he was on the track, he could have stopped to clear the locomotive or increased his speed to cross ahead of it. Certainly while he was still in control of his own fate the locomotive was plainly within his view. On his own testimony he had a clear view down the track for 600 feet. As we pointed out in our opening brief, his witness Davis had no difficulty in seeing it at a distance of over 2,000 feet.

III.

THE NEGLIGENCE OF THE DRIVER IS IMPUTED TO HIS FATHER AND BROTHER

If John Souza was guilty of negligence as matter of law then, as matter of law, that negligence is imputed to his father. (Our brief p. 39.) Appellees do not even attempt to present an argument to the contrary.

If John Souza was guilty of negligence then it was a matter of fact for the jury, to be submitted under appropriate instructions, whether John and his brother Edward were so engaged in a joint venture that the negligence of John is to be imputed to Edward.

John and Edward were not on a pleasure trip. The object of the trip was distinctly business. That business had been discussed. Edward was not going as a casual observer. That he had not agreed yet to go into the venture is beside the point. John himself had not yet agreed to anything. All three, as a business matter, were proceeding to determine whether the venture should be undertaken. John was no more committed than the others.

The family relation is not controlling as a matter of law but it is a matter of fact that cannot be disregarded. Indeed, without cooperation of some member of his family, John, a minor, could not have entered into the venture.

For a court to rule as matter of law that in such circumstances there is no ground for inference that Edward had as much interest in the business possibilities as his father and brother, is to rule that juries cannot apply common sense or draw on the common fund of knowledge of ordinary family action in the course of ordinary family affairs. In such circumstances there was no need for any agreement for right to direct and govern the conduct of the operation of the automobile. The parties had agreed to go to a definite place in a definite way for a definite business purpose—the investigation of a business possibility. Edward would have been within his rights in objecting if John had turned aside for another purpose. There was no occasion for an agreement to share in profits or in losses. The venture had not progressed that far. Its business purpose was to determine what, as a business matter, the parties would do. There was a complete community of interests in the object of the undertaking, i.e., to determine whether the family, whatever outward form the transaction might take, should stock a ranch with cattle. It certainly would not take the form of a transaction by John alone. He had neither the money nor the legal capacity.

In *Heilman v. E. P. Ry.*, 10 Cal. App. 397, 102 Pac. 15, it was enough that the driver and the person riding with him were associated together in the transfer business. Closer and stronger is *Green v. So. Cal. Ry Co.*, 138 Cal. 1, 70 Pac. 926. A mother and daughter were driving in a small market wagon. They were taking their produce to market and were to buy groceries. The wagon belonged to the father and husband. The daughter was driving. The mother and daughter were not members of the same house-

hold although they lived at the same place. The mother was responsible for the negligence of the daughter. There was no showing that they jointly owned the produce to be sold or that they were not to buy their groceries separately for their separate establishments.

A monetary interest is not a prerequisite if there is a common interest. In *Collins v. Graves*, 17 CA2d 288, 61 P2d 1198, two peace officers were riding in an automobile. The only common interest was that they both reach Sacramento, one on one mission and the other on another.

Indeed, community of interest in the ordinary business sense of the term is not necessary at all. Community of interest in making a charitable donation is enough. (*Coleman v. Calif. etc. Church*, 27 CA2d 579, 81 P2d 469.) Certainly Edward had as much interest in the common welfare of the family as the parties in the *Coleman Case* had in the welfare of the more distant and looser organization, the Church.

IV.

THERE WAS ERROR IN THE CHARGE

What has been said sufficiently disposes of appellees' argument directed to errors in the charge, that it was proper to charge that the driver John could assume there would be no negligence in the operation of the locomotive and that it was proper to deny an instruction that until put on notice to the contrary the railroad men could assume that the automobile would stay clear of the train.

No real argument is presented to meet the claims of the other errors in the charge specified. We rest on our opening brief. Of course, if we are correct in the positions heretofore taken as to the conduct of the driver it will be unnecessary for the court to consider the specified errors in the charge.

CONCLUSION

Plaintiffs tried their case as fully as they could. The negligence of John Souza, the driver of the automobile, is apparent from his own testimony. New trials are not awarded to permit a plaintiff-witness to repudiate his own testimony. A motion for a directed verdict and a motion for judgment notwithstanding the verdict having been made, the judgment so far as the driver John Souza is concerned, and the judgment for damages for the death of the father, should be reversed with direction to enter judgment for the defendant. So far as the case for damages for the death of the brother Edward is concerned the reversal should be for a new trial so that the case may be tried and submitted under appropriate instructions as to the conduct of the driver and so as to submit to the jury whether from all the circumstances the inference should be drawn that the brother Edward had as much business interest in the possible venture which all three had in mind, as to the father and the driver.

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